No. __-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MICHAEL CHANDLER, individually and as father and next friend of JESSE CHANDLER,

Petitioners,

—v.—

FORREST H. "FOB" JAMES, JR., in his official capacity as Governor of the State of Alabama and as President of the State Board of Education, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PAMELA L. SUMNERS
(Counsel of Record)
LAW OFFICES OF
PAMELA L. SUMNERS
P.O. Box 370862
Birmingham, Alabama 35237-0862
(205) 320-0200

STEVEN K. GREEN
AMERICANS UNITED FOR SEPARATION
OF CHURCH & STATE
518 C Street, N.E.
Washington, D.C. 20002
(202) 466-3234

ELIZABETH J. HUBERTZ
P.O. Box 370862
Birmingham, Alabama 35237
(205) 567-9326

STEPHEN L. PEVAR
ACLU FOUNDATION
1888 Sherman Avenue
Suite 380
Denver, Colorado 80203
(303) 839-5752

Counsel for Petitioners

36618

QUESTIONS PRESENTED FOR REVIEW

1. Absent any evidence that the state has created a public forum in its schools, does it violate the Establishment Clause for school officials to permit both students and nonschool persons to offer group prayer before a captive audience of K-12 students in classrooms, school-sponsored assemblies, sporting events and graduation exercises using the machinery of the state, including compulsory attendance laws, public address and intercom systems?

2. Did the Eleventh Circuit err in construing the doctrine of viewpoint neutrality to prohibit a court from enforcing the Establishment Clause by enjoining school officials from creating a special platform for prayer in the schools for both students and nonschool persons?

LIST OF ALL PARTIES TO THE PROCEEDING

Michael Chandler and Jesse Chandler, a minor child, by and through his next friend, Petitioners/Plaintiffs.

Don Siegelman, present Governor of Alabama, in the Governor's official capacity as president of the Alabama State Board of Education; Forrest H. "Fob" James, Jr., former Governor of the State of Alabama; William H. Pryor, Attorney General of the State of Alabama; Alabama State Board of Education; Dr. Ed Richardson, in his official capacity as Superintendent of the State Board of Education; Dr. Stephanie Bell, in her official capacity as a member of the State Board of Education; David Byers, in his official capacity as a member of the State Board of Education; Bradley Byrne, in his official capacity as a member of the State Board of Education; Mary Jane Caylor, in her official capacity as a member of the State Board of Education; Dr. Ethel Hall, in her official capacity as a member of the Alabama State Board of Education; G.J. "Dutch" Higginbotham, in his official capacity as a member of the Alabama State Board of Education; Sandra Ray, in her official capacity as a member of the State Board of Education; Mary Etta Bailey, in her official capacity as a member of the DeKalb County Board of Education; Dot D. Burke, in her official capacity as a member of the DeKalb County Board of Education; Greg Buttram, in his official capacity as a member of the DeKalb County Board of Education; Willard A. Israel, former member of the DeKalb County Board of Education;

Tommie Johnson, in his official capacity as a member of the DeKalb County Board of Education; Richard R. Land, in his official capacity as Superintendent of the DeKalb County Board of Education; Weldon Parrish, former Superintendent of the DeKalb County Board of Education; Jimmy Wilbanks, in his official capacity as a member of the DeKalb County Board of Education; Johnny Young, in his official capacity as a member of the DeKalb County Board of Education.

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CITATIONS OF OPINIONS AND ORDERS

The order of the United States Circuit Court of Appeals for the Eleventh Circuit denying the petition for rehearing is reprinted as Appendix G to the petition. The opinion of the Eleventh Circuit is reported at 180 F.3d 1254 (11th Cir. 1999) and is reprinted as Appendix A. The opinion of the district court granting in part and denying in part the motion for partial stay of the injunction is reported at 998 F. Supp. 1255 (M.D. Ala. 1997) and is reprinted as Appendix B. The opinion of the district court regarding the constitutionality of Alabama's school-prayer statute is reported at 958 F. Supp. 1550 (M.D. Ala. 1997) and is reprinted as Appendix C. The district court's permanent injunction is reported at 985 F. Supp. 1062 (M.D. Ala. 1997) and is reprinted as Appendix D. The opinions of the district court relating to the issuance of the injunction are reported at 985 F. Supp. 1068 (M.D. Ala. 1997) and 985 F. Supp. 1094 (M.D. Ala. 1997) and are reprinted as Appendix E and Appendix F.

BASIS FOR JURISDICTION

The court of appeals entered its judgment on July 13, 1999. The petition for rehearing was denied on September 29, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS and STATUTES

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the United States Constitution provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The full text of Alabama Code § 16-1-20.3 (1975 & 1993 Supp.) is set forth in Appendix H.

STATEMENT OF THE CASE

In 1993, Alabama enacted its fourth school-prayer statute within a 15-year period, Alabama Code Section 16-1-20.3. The operative portion of the statute provides:

> On public school, other public, or other property, non-sectarian, non-proselytizing student-initiated voluntary prayer, invocations and/or benedictions, shall be permitted during

> compulsory or non-compulsory school-related student assemblies, school-related student sporting events, school-related graduation or commencement ceremonies, and other school-related student events.

Ala. Code 16-1-20.3(b) (1975 & 1993 Supp).

On February 1, 1996, Michael Chandler and his son Jesse sued, challenging the constitutionality of the statute both facially and as applied in DeKalb County, Alabama where the family has lived and worked and where Jesse attends one of eight K-12 schools. Among other things, the Chandlers alleged and the trial court concluded, in factual findings that were not challenged on appeal, that the following religious activities had taken place in DeKalb County schools:

•**Christian prayers in the classrooms as part of orchestrated student activity**. In a number of cases in DeKalb County, students led their peers in corporate prayers or religious devotionals in the classroom or over the intercom during the school day. For example, the teacher would select a student to lead the prayer, or the teacher would give a signal and the students would pray in unison. In Jesse Chandler's homeroom, his teacher selected students to offer prayers or Bible readings and did so herself in the absence of student "volunteers." Students also prayed over the school-intercom system during homeroom. There is no evidence that school officials made the school intercoms available for other speech unrelated to school business or allowed school clubs to conduct club activities over

the intercom system.

•**Christian prayers at compulsory school assemblies.** During the school day, DeKalb County public schools hold assemblies where attendance is required or where students must choose between attendance or study hall. School officials control the assemblies and decide the content of the programs. At these assemblies, students or clergy have led prayers and religious devotionals. For example, assemblies for programs such as D.A.R.E. have featured prayer. Although this drug-awareness program is not compulsory, all fifth-graders, including Jesse Chandler, participated. Both before and after suit, Jesse Chandler attended assemblies where prayers or devotionals were offered.

•**Christian prayers over the loudspeaker at high school football games offered by students or clergy.** For several years prior to suit, Christian prayers were recited by students or clergy over the loudspeaker at DeKalb County football games. DeKalb County stipulated to control over access to the public-address system at home football games. There is no evidence that DeKalb County ever set aside use of the system for student expression or otherwise established a public forum for the discussion of other topics or viewpoints. There is no evidence that prayers from non-Christian religious traditions were offered or that any other type of speech, other than announcements related to the games, was broadcast. Specimen prayers before and after suit were videotaped and entered into evidence. While attendance at football games is not

a curricular requirement, most students attend, including students not yet in high school. The Chandlers have attended such football games.

•**Christian prayers at high-school graduation ceremonies**. For several years prior to suit, graduation prayers, identified as "invocations" or "benedictions," were led by students or clergy. They were listed on preprinted programs separately from valedictory or salutatory addresses, which were presented independently. As stipulated, school officials plan the ceremonies and control the form and content of the graduation programs. There have been no prayers from non-Christian religious traditions, and no speech besides prayer has ever been offered during the prayer segments. Several prayers were videotaped and entered into evidence, and each invokes the name of Jesus. After the suit was filed, the word "invocation" was dropped from the preprinted program at Sylvania School and the words "Class Historian" inserted. For three years in a row, the class historian led the audience in prayer, just as had taken place during the "invocation" prior to suit. In addition to Sylvania, other schools continued to permit prayer after suit was filed.

•**Other Christian religious activities in the DeKalb County schools.** In addition to the above activities conducted pursuant to the statute, DeKalb County officials permitted ministers and evangelists to speak at school events such as mandatory drug- or AIDS-awareness assemblies and to pray, proselytize, make extended religious remarks, and invite

students to church functions. At one school-related event that Jesse Chandler was compelled to attend as a member of the band, two ministers prayed and invited the crowd of parents and students to church. School officials also allowed nonschool persons to enter classrooms to make presentations and distribute Gideon Bibles. DeKalb offered no evidence suggesting the creation of a limited public forum for any distributions by nonschool persons and in fact acknowledged that school officials screened distributions for content deemed appropriate for the school environment.

After the Chandlers filed for preliminary injunction, the defendants agreed to voluntarily cease the activities claimed to be unconstitutional pending the court's ultimate ruling. The Chandlers agreed not to pursue a preliminary injunction hearing based on this promise but preserved their right to seek injunctive relief. This agreement, styled a Joint Motion, was signed by counsel for all parties and was filed with the Court.[1] Shortly after signing the Joint Motion, DeKalb County violated the agreement by sponsoring prayers at graduations. The Chandlers submitted evidence of ongoing violations, documenting prayers at school-sponsored events.

On March 12, 1997, the trial court declared section 16-1-20.3 facially unconstitutional. Despite the declaratory

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[1]The Joint Motion and its Exhibit A were patterned on "Religion in the Public Schools: A Joint Statement of Current Law" and are reprinted as Appendix I to this petition.

judgment, DeKalb County continued to violate the Joint Motion and to engage in activities which, according to the March opinion, violated the First Amendment. For example, even though the Joint Motion specified that school officials would intercede to stop religious harassment of students, they did not do so. The trial court found that DeKalb County had permitted classmates' harassment of Jesse Chandler for a period of months. Between October 1996 and April 1997, approximately 175 of 200 students stood and prayed aloud when Jesse entered the lunchroom, on a signal of "One, two, three, pray." Despite complaints from the Chandler family, both the school principal and the superintendent refused to stop the conduct. Jesse was forced to take his lunch alone in a classroom.

Based on uncontroverted evidence of ongoing violations of both the Joint Motion and the Establishment Clause, the Chandlers sought permanent injunctive relief. On October 23, 1997, DeKalb County filed a pleading stating that it wanted clarification on the question of whether "a federal judge has the authority to tell school officials and administrators in DeKalb County how to handle the issue of school prayer" and "if a federal judge can do whatever he wants whenever he wants to." (App. E12.) On October 29, 1997, the trial court entered the permanent injunction the plaintiffs sought. The trial court appointed a compliance monitor in light of the defendants' history of noncompliance with the law, the Joint Motion, and the March order.

The injunction explained in detail that school-sponsored

religious activities, whether purporting to be student-initiated or not, were constitutionally impermissible. The district court repeatedly stressed that its injunction reached only "school-organized" or "officially sanctioned" prayer -- that is, prayer occurring in situations where school officials actively control the setting and students cannot realistically express opposing views or offer other unsanctioned speech. The injunction explicitly protected students' rights under the federal Equal Access Act (for grades 7-12). (App. D4-D5, D9.) It also allowed students to distribute religious literature to the same extent that they could distribute other literature,[2] to express religious beliefs in school assignments, to wear religious clothing and jewelry, to attempt to persuade their peers on religious issues, and to quietly engage in religious activity during noninstructional time. (*Id.*)

The injunction was supported by extensive factual findings detailing numerous and diverse occasions on which religious activities took place at school-related, school controlled events. (*See* App. E19-30, E38-46, E51-55, E57-63.)

The defendants asked the trial court to stay enforcement of portions of the injunction pending appeal, posing a number

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[2]The trial court allowed DeKalb County to craft its own policy for distributions of written materials by nonstudents, with the sole directive that the policy be neutral and uniform in application to all subject matters. DeKalb chose a policy closing its schools to all political, commercial, promotional, and religious distributions by nonstudents.

of hypothetical scenarios premised on overbreadth and a supposed chilling effect. The trial court denied the motion in a lengthy opinion rejecting defendants' construction of the injunction except for 12 words regarding noisy or disruptive prayer that the trial court agreed were imprecisely worded. The motion for stay was not renewed in the Eleventh Circuit.

The defendants[3] appealed only those provisions of the injunction prohibiting school officials from "permitting" students' and nonschool persons' religious exercises at "school-sponsored" or "officially sanctioned" activities. They did not appeal those provisions prohibiting school officials from offering prayers. Moreover, the defendants did not challenge a single factual finding on appeal.

The Eleventh Circuit decision was issued on July 13, 1999. In vacating the injunction, the appeals court held that there is no state action when a student or a nonschool "other"[4]

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[3] Alabama Governor Forrest H. "Fob" James, Jr. raised only one issue on appeal, arguing that the Bill of Rights does not apply to the state of Alabama.

[4] The Eleventh Circuit explained that its use of the word "student" throughout the opinion should be understood to include all "nongovernmental private parties." (App. A6 at n.6.) It held that "students or other private parties" have a First Amendment right to pray at school-related events. (App. A22. *See also* App. A25.) In DeKalb County, the nongovernmental private parties offering prayers were Christian ministers and evangelists. (*See* App. E27, E43, E60.)

prays as part of a school-controlled event. It further held that if school officials fail to permit prayers by students and nonschool "others" during school-sponsored events the officials control, the officials evince unconstitutional hostility toward religion and practice "viewpoint discrimination." Although the panel found fault with only pieces of the injunction – specifically, the trial court's use of the word "permit" with regard to the speech of students and nonschool others – it vacated the entire injunction. In addition, the opinion was filled with language complaining about efforts to "cleanse" religion from the public schools. (*See, e.g.*, App. A15 ("'Cleansing' our public schools of all religious expression, however, inevitably results in the 'establishment' of disbelief – atheism – as the State's religion.").)

The Chandlers petitioned for rehearing *en banc* on August 8, 1999. Their petition was denied September 29, 1999. This petition timely follows.

REASONS FOR GRANTING THE WRIT

I.

This Petition Presents Important First Amendment Questions That Should Be Settled By This Court

For over 50 years, this Court's school-prayer holdings have consistently reaffirmed the same basic rules: public school officials may not promote or endorse a particular religion or

religion generally, nor may they direct or encourage student participation in religious activities. *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Abington Twp. Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). Likewise, school officials may not turn over classrooms and other school-controlled events to outside individuals to engage captive student audiences in prayer, religious instruction, or other devotional activity. *Lee v. Weisman*, 505 U.S. 577 (1992); *People ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

The Eleventh Circuit decision is irreconcilable with these holdings and blurs the careful distinctions this Court has drawn among school-controlled expression, individual private expression, and expressive rights in public fora. In misplaced reliance on free-speech doctrine, the decision allows corporate sectarian prayers and public religious activity in classrooms and as part of school-controlled events before captive audiences of K-12 students.

More specifically, the Eleventh Circuit's decision undermines this Court's school-prayer precedents by requiring schools to permit students and nonschool persons to engage unwilling students in religious activity as part of school-controlled events. It misconstrues this Court's First Amendment precedents by holding that students and nonschool persons have a virtually unfettered right to religious expression in the public schools, even in the absence of any indication that the DeKalb County schools have created a forum or that nonreligious

speech is welcome or permitted on an indiscriminate basis. Finally, the decision is inconsistent with this Court's precedents governing injunctions by holding that an injunction discriminates on the basis of viewpoint if it names the subject matter on which it operates. This departure from settled law, moreover, occurred in the course of reviewing an injunction that remedied applications of a school-prayer statute that was ruled facially unconstitutional.

Because issues involving school prayer remain highly controversial and implicate core First Amendment values, this case presents constitutional issues of great importance that should be resolved by this Court.

A. The Decision Undermines This Court's Precedents About Prayers Before Captive Student Audiences

The Eleventh Circuit's decision commands school officials to permit the very type of religious activity that this Court has forbidden: audible prayer and religious activity in the classroom;[11] prayer and devotional speech over school public-address systems;[12] and prayer and devotional speech by students and nonschool persons at school-controlled events, including

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[11] *See Karen B. v. Treen*, 653 F.2d 897 (5th Cir.), *aff'd*, 455 U.S. 913 (1982); *McCollum*, 333 U.S. 203.

[12] *See Schempp*, 374 U.S. 203.

assemblies, sporting events and graduation ceremonies.[13] According to the Eleventh Circuit, as long as such prayer is not conducted or commanded by school officials, it must be permitted. Few holdings could be in greater conflict with this Court's First Amendment jurisprudence.

The Eleventh Circuit disregards several principles which undergird this Court's entire school-prayer lexicon. As this Court has frequently observed, "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary schools." *Lee*, 505 U.S. at 592. *See also Edwards v. Aguillard*, 482 U.S. 578, 584 (1987); *Schempp*, 374 U.S. at 307 (Goldberg, J., concurring). This Court recognizes that the public schools exercise tremendous control and influence over schoolchildren who are highly impressionable and subject to peer pressure, even when the school-controlled event is "voluntary." *See Lee*, 505 U.S. at 593; *Edwards*, 482 U.S. at 584; *McCollum*, 333 U.S. at 227 (Frankfurter, J., concurring). This Court also recognizes that public school children have limited freedoms due to compulsory attendance requirements and are usually unable to absent themselves from prayer and other religious activity they or their parents may find objectionable. *Schempp*, 374 U.S. at 223; *Edwards*, 482 U.S. at 584. Finally, this Court "recognize[s], among other things, that prayer exercises carry a particular risk

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[13] *See Lee*, 505 U.S. 577.

of indirect coercion." *Lee*, 505 U.S. at 592.

The Eleventh Circuit, however, devalued all these principles, apparently finding these jurisprudential facts unwelcome in its analysis.[14] It ignored this Court's concern with captive student audiences, particularly the rights of nonadherents of the speaker's religion. *Compare* App. A20 ("[t]hose who do not espouse a speaker's religious belief are free not to listen, and to express their disagreement by not participating in any way") *with Lee*, 505 U.S. at 593 ("It is of little comfort to a dissenter . . . to be told that . . . the act of standing or remaining in silence signifies mere respect, rather than participation."). Under the rubric of protected private speech, the Eleventh Circuit subordinated the rights of captive audiences of K-12 school children to the putative free-speech rights of their peers and even adult "others" to lead corporate prayer in the classroom, over the school intercom, over the microphone at assemblies, at sporting events, and at graduations. Even if the prayer and religious exercises were purely student-initiated, however, there is no constitutional right to deliver them over a school intercom to K-12 students as part of school-controlled events.

The Eleventh Circuit declined to follow this Court's lead

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[14] The Eleventh Circuit also brushed past the equally unwelcome fact that this case involves official promotion of and favoritism toward religious speech – rather than pure student-initiated prayer that has no risk of identification with the state.

by taking into account the confined circumstances in which public school children find themselves and the use of school facilities and audiences to promote religion. Rather than focusing on the use of the machinery of the state – in the form of mandatory attendance laws, school-sponsored events, classrooms, microphones, and intercoms to convey religious messages – it focused on the identity of the speaker and the proselytizing content of the speech. It concluded that religious speech by students and nonschool persons, even when part of a school-sponsored event,[15] is "private" and not subject to regulation by school officials or courts. Accordingly, this "private" prayer not only may, but must, be permitted in classrooms and at school events. Why? According to the Eleventh Circuit, no state action is implicated in such speech or expression, no matter how much control the school exercises over the setting.

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[15] No one – including the Chandlers and the trial court – has ever contested the right of students to engage in *truly* private prayers, i.e., praying before a test or saying a private grace before meals in the lunchroom. The injunction forbid (and the Eleventh Circuit directed) school officials to permit the praying of audible, corporate prayers that become part of the school-sponsored event at issue. (*Compare* App. A21-A22 *with* App. D4-7.) The type of prayers reached by the injunction would include a student or member of the clergy using the school microphone and saying to a captive audience, "Let us pray," but not a group of students praying among themselves in the stands when all are free to move around. (*See* App. C23-26; App. B69-71, B87-91.)

The Eleventh Circuit opinion included a caveat to its sweeping state-action conclusion: students and nonschool persons may not offer proselytizing prayer using the "machinery of the state as a vehicle for converting [the speakers'] audience." In that single context, the Eleventh Circuit acknowledged that "[p]roselytizing speech is inherently coercive and the Constitution prohibits it from the government's pulpit." (App. A25-26.) This concession is surely true, but it is also far too limited a view of the Establishment Clause. As this Court has repeatedly noted, endorsement, not indoctrination, is what counts for Establishment Clause purposes. *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 389-91 (1984); *Schempp*, 374 U.S. at 264, 282-86 (Brennan, J., concurring). In other words, the very use of the "government's pulpit" is often what makes an Establishment Clause violation, regardless of whether the goal of the prayer is to win converts. Notably, the prayers struck down in *Engel* and *Lee* were decidedly nonproselytizing (as well as nonsectarian), and they were offered by someone other than a school official.

The Eleventh Circuit also erred by focusing too narrowly on whether students act as "surrogates" for the state when praying in school. To be sure, surrogacy factors in this case, with teachers choosing students to pray and principals employing such devices as a "historian's address" as a substitute for clergy-led prayer. But restricting state action to surrogacy, while it aids in a subterfuge inquiry, does not answer the essential question of whether prayer in the context of a school-

sponsored event would be taken by an impressionable schoolchild as an endorsement of religion. Nor does it assuage the affront to the conscience of the dissenter in the school milieu. These are the questions that have mattered to this Court, from *Engel* and *Schempp* to *Ball* and *Lee*. Endorsement and captive audience, not a formalistic notion of state action or proselytism, have been this Court's polestars for decades.

The Eleventh Circuit disregarded this Court's endorsement holdings and gave no consideration to the ways in which permitting prayer and religious activity lends the state's imprimatur to religion. After all, when governmental officials endorse religion, the state action generally is confined to providing the platform for the speech. As Justice Souter has noted, truly "private" prayer neither seeks nor requires a microphone and an audience. Because students "have no need for the machinery of the State to affirm their beliefs, the government's sponsorship of prayer . . . is most reasonably understood as an official endorsement of religion." *Lee*, 505 U.S. at 630-31 (Souter, J., concurring). It is for this reason that schools may not "permit" their machinery to be used to sponsor prayer.

This is not a novel proposition. Since the 1940s, this Court has made it clear that the state may not "permit" its facilities to be used for promoting religion, and it has given no quarter to the nonschool "others" the Eleventh Circuit generally exempts from the strictures of the Establishment Clause. In *McCollum*, the school district merely "permitted" private

religious teachers to use public school classrooms and have access to students. Even though the religious teachers were technically private actors, this Court held that the Establishment Clause applied. 333 U.S. at 205, 209.

The Eleventh Circuit, subject to qualifications that are inconsistent with this Court's authorities and which do not address fundamental Establishment Clause concerns, proscribes only prayer led by school officials. But "the Establishment Clause does not limit only the religious content of the government's own communications .... Indeed the very concept of endorsement conveys the sense of promoting someone else's message." *County of Allegheny v. ACLU*, 492 U.S. 573, 600-01 (1989). *See also Lee*, 505 U.S. at 592 (secondary-school students are likely to perceive school-sponsored religious exercises as an "attempt to employ the machinery of the state to enforce a religious orthodoxy"). The Eleventh Circuit's cramped view of the state involvement necessary to trigger the Establishment Clause conflicts with this Court's precedents and erodes fundamental Establishment Clause values.

B. The Decision Misconstrues This Court's Student Free-Speech Holdings

Just as it does with this Court's school-prayer precedents, the Eleventh Circuit misconstrues this Court's free-speech holdings. Without citing apposite authority, it reached the conclusion that students and nonschool persons have expansive expressive rights to engage in religious speech at school-controlled events.

The reason for this conclusion appears to be the Eleventh Circuit's general notion that schools and school-sponsored activities are fora for virtually unfettered expression by students and nonschool persons.[16] This notion, however, has no support in the record or in this Court's precedents.

This Court has held that school facilities and functions may be deemed to be public fora only if school officials have deliberately opened them for public discourse (necessarily a factual inquiry). *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988); *Cornelius v. NAACP Leg. Def. and Educ. Fund*, 473 U.S. 788, 800-03 (1985); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983). Outside of those situations where school officials have expressly set aside school facilities or functions for "indiscriminate use" and discourse, "then no public forum has been created." *Hazelwood*, 484 U.S. at 267.

Not only is there no evidence that DeKalb County ever opened its classrooms, assemblies, graduation ceremonies, and sporting events for indiscriminate use by the general public, but the trial court's uncontested factual findings reflect the opposite – that DeKalb County created platforms for religious speech solely, which were put to that use by students and clergy. Despite the facts, the Eleventh Circuit opened the door that

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[16] *See generally* App. A25 (summarily invoking selected forum cases).

DeKalb did not, and declared that all persons have a First Amendment right to pray at its school-controlled events.

The Eleventh Circuit seems to have relied for its decision on *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969). It wrote, "Students do not shed their constitutional rights . . . at the schoolhouse gate." (App. A16, *quoting Tinker*, 393 U.S. at 506). It also wrote, "Religious speech by students does not become forbidden 'state action' the moment the students walk through the schoolhouse door." (App. A16-17.)

The Chandlers have never contended for such propositions, however. What they contest is religious speech at school-controlled events in front of captive student audiences. Deducing that "private" religious speech can never violate the Establishment Clause is faulty. It devolves from the conclusion (derived in a factual vacuum) that students simply are not state actors, and a concomitant disregard of endorsement principles. (App. A8-13.) Any characterization of the injunction as hostile to *Tinker* rights or to religious expression is seriously misguided.

In fact, the injunction the Eleventh Circuit reviewed, far from demanding that students "shed" their rights, is extremely respectful of them. Because the trial court recognized that students have preexistent First Amendment rights to private expression, the injunction explicitly states that it does not proscribe students' rights to private prayer and religious activity.[17] (See App. D4-9.)

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[17] The trial court emphasized this point with all capital letters, just as it emphasized by italics and underlining that its injunction reached only

Tinker in fact should have served as a reason to affirm the injunction, not to vacate it. The trial court did not wander near reserved student rights, as the injunction makes clear in its several clarifications of what it does not proscribe. The injunction operates only on school-sponsored or officially sanctioned speech, where *Tinker* is not operable. *Tinker* rights subsist in the genre of private speech, not officially sanctioned speech that tends to "impinge on the rights of other students" who wish to be free from indirect religious coercion. 393 U.S. at 509.[18] This distinction was captured by the district court and was apparently overlooked on appeal.

Finally, of course, nothing in *Tinker* suggests that *nonschool persons* have any right to self-expression in the public schools.[19]

"school-sponsored" or "officially sanctioned" religious activities. (*See* App. D4-9.)

[18] The students in *Tinker* sought to wear black armbands in silent protest of the Vietnam War. They did not seek to use the machinery of the state to broadcast their message to a captive audience, obviating the risk that the state would be seen as endorsing or adopting the message of the student protestors. Indeed, as this Court has observed, the rights protected under *Tinker* are qualitatively different from the interest in expressing oneself in conjunction with school-controlled activities, a distinction this Court characterized as that between "speech that is sponsored by the school and speech that is not." *Hazelwood*, 484 U.S. at 270-71, n3.

[19] It bears repeating that the Eleventh Circuit's decision permits any speaker, not only a student, to wring expressive benefits from the

In this case, the issue is not whether students have *Tinker* rights, but whether the machinery of the state may be used by students and nonschool persons who wish to pray publicly in school, notwithstanding the resulting appearance of endorsement and its impact on impressionable students. *Tinker* cannot answer this question. Nor, on these facts, can public-forum analysis. This case must be resolved as the district court resolved it: under the Establishment Clause.

C. The Decision Prevents Trial Courts From Fashioning Injunctive Relief In Constitutional Cases

Finally, by holding that the district court's efforts to prevent recurrence of specific constitutional violations amounts to prohibited viewpoint discrimination, the Eleventh Circuit hamstrings the ability of trial courts to redress these violations. Indeed, the holding renders the entire function of injunctions meaningless. Because injunctions are the standard remedy in most constitutional cases, the decision raises a highly important issue which warrants correction.

In *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), this Court rejected the proposition that restricting speech in order to achieve the remedial objectives of an injunction results in "viewpoint discrimination" merely because

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government by demanding to use the machinery of the state to broadcast his or her message, regardless of Establishment Clause concerns. This Court has never subscribed to this view. *Compare* App. A22 *with Bowen v. Roy*, 476 U.S. 693, 699-700 (1985). *See also Grayned v. City of Rockford*, 408 U.S. 104, 117-18 (1972).

the particular speech that is the subject of the remedy is addressed in the injunction. 512 U.S. at 762-63.[20] In fact, as this Court has held, injunctions are to be construed against the factual circumstances that generated them. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 770-71 (1976) (*quoting Albemarle Paper Co. v. Moody*), 422 U.S. 405, 421-22 (1975)).

But here the Eleventh Circuit has simply ignored undisputed factual findings, and then substituted a theory in their place, in much the same way it has judicially declared a public forum without regard to contrary facts. The record establishes that prayers (and only prayers) routinely took place as part of school-sponsored events in DeKalb County, pursuant to a statute that required DeKalb to permit those prayers (and only prayers). By enjoining DeKalb County from permitting those prayers, the trial court did no more than restore the status quo. And, just as it was not "viewpoint discrimination" in *Madsen*, it is not viewpoint discrimination to remedy an Establishment Clause violation and remove religious speech from its special, favored position, returning it to the same status enjoyed by all other speech.

Nor does it make any difference that this case involves the Establishment Clause, rather than a commercial transaction or some other statutory or constitutional provision. Indeed, this

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[20] *Madsen* arose in the context of a public forum that does not exist here or in the public schools generally. Nonetheless, its holding on viewpoint discrimination is applicable here.

Court has rejected the proposition that injunctions operating on establishments of religion are to be construed any differently than other injunctions. *Lemon v. Kurtzman*, 411 U.S. 192, 200-01 (1973). The Eleventh Circuit's holding undermines these precedents and hampers attempts to fashion specific relief for constitutional violations involving First Amendment claims.

All of these substantial questions, involving matters of great public importance and affecting interpretations of Court precedent, require this Court's attention and correction.

II.

The Decision of the Eleventh Circuit Is in Direct Conflict With Decisions of Other Circuits

Not only is the Eleventh Circuit's opinion inconsistent with this Court's precedents, but it also conflicts with decisions of other circuits.

Petitioners are aware that this Court has granted certiorari to review the constitutionality of student-initiated prayer at football games in a case that reached the opposite result the Eleventh Circuit reached. *See Santa Fe Indep. Sch. Dist. v. Doe*, 168 F.3d 806 (5th Cir.), *cert. granted*, 68 U.S.L.W. 3321 (U.S. Nov. 15, 1999) (No. 99-62). Even if this Court resolves the question of student-led prayers outside of instructional settings or outside of the school day in *Santa Fe*[21],

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[21] *Santa Fe* does not present "school day" questions on its facts, whereas *Chandler* does.

the resolution of this narrow question will not resolve the conflict presented by *Chandler*. While the Eleventh Circuit decision conflicts with *Santa Fe* by directing school officials to permit students to lead prayers at football games and other athletic events, the Eleventh Circuit ventures much further than any court ever has in requiring school officials to permit prayers by *nonschool persons* and also invades the classroom and other school-day events. *Compare Santa Fe*, 168 F.3d at 817 (expressing disapproval of permitting "fire-and-brimstone sermonettes" by religious representatives even if invited by students) *with* A22, A25. Thus, the pendency of *Santa Fe* does not militate against granting certiorari here.

The Eleventh Circuit's decision that there is generally no state action in speech that is not initiated by school officials conflicts with the law of other circuits (including on the question of "permitting" prayer at school-sponsored events); the conclusion that free-speech rights justify Establishment Clause violations is contrary to the decisions of other circuits; and the holding that school officials create a limited public forum by permitting only religious speech conflicts with the decisions of other circuits. And, finally, the practical effect of the Eleventh Circuit's holding conflicts with decisions of other circuits, *e.g.*, allowing prayer by students and nonschool persons in classrooms, school-controlled assemblies, sporting events and graduation ceremonies.

A. The State-Action Holding Is Anomalous

The other circuits that have ruled on the state-action

defense to student-initiated or -led prayers, including those "permitted" by school officials, have held contrary to the Eleventh Circuit. The Fifth, Third, Ninth, Second, and Seventh Circuits have asked not who the speaker is, but whether the machinery of the state has been used to endorse religion.

For example, the Fifth Circuit, construing a statute indistinguishable from Alabama's, struck it. The state argued at every juncture that state action was not implicated by a statute requiring school officials to "permit" "nonsectarian, nonproselytizing, student-initiated, voluntary prayer" at assemblies, sporting events, graduations, and other school-related events. The district court's rejection of the state-action defense was upheld on appeal, the Fifth Circuit expressly finding the statute unconstitutional notwithstanding that students were the speakers, because it made use of the coercive power of the state, including compulsory attendance laws. *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274 (5th Cir.), *cert. denied sub nom. Moore v. Ingebretsen*, 519 U.S. 965 (1996).[22] *Accord*

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[22] Nor does *Ingebretsen* stand alone in the Fifth Circuit. In *Santa Fe*, the Fifth Circuit, examining student-led football game prayers, again rejected a state-action defense: "[G]overnment imprimatur is not so easily masked: Prayers that a school 'merely' permits will still be delivered to a government-organized audience, by means of government-owned appliances and equipment, on government-controlled property, at a government-sponsored event, thereby raising substantial Establishment Clause concerns." 168 F.3d at 817. *Accord Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 160, 162-63 (5th Cir. 1993) (*Doe II*) (enjoining prayers not led by school officials at school assemblies and pep rallies). Notably, *Jones*

Karen B. v. Treen, 653 F.2d 897, 902 (5th Cir.), *aff'd*, 455 U.S. 913 (1982) (striking voluntary-prayer statute providing for student-led classroom prayer because statute made use of compulsory attendance laws, school hours, school supervision, and schoolchildren); *Doe v. Duncanville Indep. Sch. Dist.* (*Doe I*), 994 F.2d 160 (5th Cir. 1993) (affirming injunction forbidding school employees from "permitting" or promoting prayer during school-sponsored sporting events); *Doe II*, 70 F.3d at 406 (student-led prayers unconstitutional where school employs its facilities and programs for this purpose).

The Ninth Circuit is also in conflict with the Eleventh Circuit. In *Collins v. Chandler Unified School District*, 644 F.2d 759, 761 (9th Cir. 1981), the court found no meaningful distinction between school authorities' permitting and students' directing of religious exercises at school-sponsored assemblies and upheld an injunction prohibiting school officials from "'permitting, authorizing, or condoning the saying of public prayers by students.'" It did so explicitly because it recognized that school officials do not as a practical matter have a "hands-off" attitude toward major school functions and that school

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v. Clear Creek Independent School District, 977 F.2d 963 (5th Cir.) (*Jones II*), *cert. denied*, 508 U.S. 967 (1992), while authorizing student-initiated prayer at graduation ceremonies only, unlike *Chandler*, does not extend its holding to nonschool persons. *See Santa Fe*, 168 F.3d at 818 (explaining that graduation prayers were constitutional in *Jones II* because they were not clergy-led).

officials control access to school facilities. 644 F.2d at 762-63.

In *ACLU v. Blackhorse Pike Regional Board of Education*, 84 F.3d 1471, 1477-79 (3d Cir. 1996) (*en banc*), the Third Circuit likewise held that even if school officials delegate control over some aspect of a school-sponsored graduation program to students, an Establishment Clause violation may still occur because the program is school-sponsored and *Lee*'s coercive effects can exist with student-led prayer. Similarly, the Second Circuit, in *Stein v. Oshinsky*, 348 F.2d 999 (2d Cir.), *cert. denied*, 382 U.S. 957 (1965), reversed an order that prohibited school officials from preventing student-led prayer during the school day, reasoning that the "closely organized schooling of young children" rendered "'student-initiated' prayers" at school events "an illusion." 382 F.2d at 1001.[23]

The Seventh Circuit has rejected the Eleventh Circuit's assumption that religious activity conducted by nonschool persons is immunized by lack of state action. It has held that, far from immunizing them, the very fact that school officials give nonschool others permission to use the machinery of the state, by opening up their classrooms, auditoriums, and captive student audiences to the Gideons, makes these "others" state actors for purposes of the Establishment Clause. *Berger v.*

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[23] *Stein*, *Treen* and *Ingebretsen* are also instructive on the free-speech issue, discussed *infra*. In those cases, the schools allowed for no other forms of expression and created special platforms for religious speech, as in *Chandler*.

Renssalaer Cent. Sch. Corp., 982 F.2d 1160, 1165-66 (7th Cir.), *cert. denied*, 508 U.S. 911 (1993).

B. The Free-Speech Holding Is Anomalous

Just as the circuits that have binding precedents on the state-action issue have rejected the Eleventh Circuit's position, so have they rejected any rationale whereby free speech subverts the Establishment Clause. No other court has held that students and nonschool persons have a right to engage in prayer and religious activity in school-related events irrespective of the existence of a public forum or any other identifiable source of such expressive rights.

The Third, Ninth, Seventh, and Fifth Circuits have rejected the Eleventh Circuit's position. The lack of a public forum was central to their reasoning. In *Blackhorse Pike*, the Third Circuit rebuffed the free-speech justification for prayer led by elected students at graduation because it found no public forum. *See* 84 F.3d at 1477. In *Collins*, the Ninth Circuit found unpersuasive a proffered free-speech justification for student-led prayer at school assemblies because of the constraints of the school setting. *See* 644 F.2d at 762. In *Berger*, the Seventh Circuit found that, where the state opens its classrooms to the Gideons, the "free speech of private actors" rationale fails as a matter of law. *See* 982 F.2d at 1166-67. In *Santa Fe*, the Fifth Circuit held that, even where school officials do not monitor content and students lead the prayers, free speech fails as a defense to an Establishment Clause violation because public forum analysis fails where government facilities are used and

school control exists. *See* 168 F.3d at 817, 819-22 (also rejecting viewpoint discrimination argument).

The Eleventh Circuit parts company with the other circuits on this crucial issue.

CONCLUSION

Because the Eleventh Circuit's decision is irreconcilable with this Court's relevant precedents and inconsistent with the decisions of other circuits, the petition for a writ of certiorari should be granted.

PAMELA L. SUMNERS*
LAW OFFICES OF PAMELA L. SUMNERS
P.O. Box 370862
Birmingham, AL 35237-0862
(205)320-0200
*COUNSEL OF RECORD

ELIZABETH J. HUBERTZ
P.O. Box 370862
Birmingham, AL 35237
(205)567-9326

STEVEN K. GREEN
AMERICANS UNITED FOR SEPARATION OF CHURCH & STATE
518 C Street, N.E.
Washington, D.C. 20002
(202) 466-3234

STEPHEN L. PEVAR
ACLU FOUNDATION
1888 Sherman Avenue
Suite 380
Denver, CO 80203
(303) 839-5752

APPENDIX

APPENDIX

A. Panel decision in *Michael Chandler* et al. *v. Forrest H. "Fob" James, Jr.*, et al., 180 F.3d 1254 (11th Cir. July 13, 1999) A1

B. District Court's Order on Motion for Partial Stay of Permanent Injunction (December 17, 1997) B1

C. District Court's Memorandum Opinion and Order regarding section 16-1-20.3 of the Alabama Code (March 12, 1997) C1

D. District Court's Permanent Injunction (October 29, 1997) D1

E. District Court's Supplemental Opinion and Order (November 12, 1997) E1

F. District Court's Memorandum Opinion and Order (November 12, 1997) F1

G. Eleventh Circuit order denying rehearing and rehearing *en banc* (September 29,1999) G1

H. Constitutional and statutory provisions H1

I. Parties' Joint Motion to Vacate This Court's Order and Agreement of Voluntary Cessation of Certain Activity Pending This Court's Decision I1

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 97-6898, 97-6953

D. C. Docket No. 96-CV-169-N

MICHAEL CHANDLER, individually and as
next friend of his son, Jesse Chandler,
et al.,

Plaintiffs-Appellees,

versus

FOB JAMES, JR., in his official capacity
as Governor of the State of Alabama and
President of the State Board of Education,
et al.,

Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Alabama

(July 13, 1999)

Before TJOFLAT, Circuit Judge, and GODBOLD and HILL, Senior Circuit Judges.

HILL, Senior Circuit Judge:

Plaintiffs brought this action challenging the facial constitutionality of Alabama's statute permitting non-sectarian, non-proselytizing student-initiated prayer, invocations and benedictions during compulsory or non-compulsory school-related assemblies, sporting events, graduation ceremonies and other school-related events. Plaintiffs also challenged the statute as applied by the DeKalb County School Board. The district court held the statute unconstitutional on its face, granted plaintiffs partial summary judgment on their claims regarding the statute as applied, and enjoined defendants from enforcing the statute or continuing to conduct the challenged practices. Defendants bring this appeal.

I.

In 1993, the Alabama Legislature enacted a statute containing the following provision:

> (b) On public school, other public, or other property, non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation

> and/or benedictions, shall be permitted during compulsory or non-compulsory school-related student assemblies, school-related student sporting events, school-related graduation or commencement ceremonies, and other school-related student events.

Ala. Code § 16-1-20.3(b) (1995).

In 1996, Michael Chandler, a vice-principal in the DeKalb County school system, and his son Jesse, a student in that system, brought this action challenging the facial validity and the application of this statute in the DeKalb County schools.[1] Defendants included the Governor of the State of Alabama, the State Superintendent of Education, the members of the State Board of Education, and the Superintendents and members of the boards of education of the City of Talladega and of DeKalb County, Alabama.[2]

On March 12, 1997, the district court granted partial summary judgment for the Chandlers, holding the statute facially unconstitutional. On October 29, 1997, the district court permanently enjoined DeKalb County from enforcing the statute. On November 12, 1997, the district court issued findings of fact and conclusions of law in its Supplemental

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[1] Also named as plaintiffs are Jane Doe and her daughter Deborah Doe.

[2] The Chandlers subsequently entered into a partial consent decree with the City of Talladega and the district court dismissed the Talladega defendants from the case in 1996.

Opinion and Order. That same day, but by separate Memorandum Opinion and Order, the district court held that DeKalb had engaged in unconstitutional officially organized or sponsored religious activities, and granted summary judgment to the Chandlers on their claim that DeKalb had applied the statute unconstitutionally. The district court appointed a monitor to oversee the enforcement of the Permanent Injunction. All defendants appealed from the Permanent Injunction, the Supplemental Opinion and Order, and the Memorandum Opinion and Order.

In his brief, the Governor of the State of Alabama asserts that the district court erred in holding the statute facially unconstitutional under the First Amendment. The Governor contends that the First Amendment's prohibition against the establishment of a religion does not apply to the states by virtue of the Fourteenth Amendment. The district court rejected this argument, as do we. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). *See also Everson v. Board of Educ.*, 330 U.S. 1, 8 (1947). Because the states are bound by the First Amendment, the district court did not err in evaluating Alabama's statute under it. Accordingly, we shall affirm the judgment of the district court as to the Governor's appeal.[3]

The remainder of the appellants (referred to collectively

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[3] The Governor does not assert any other error by the district court. We do not decide whether the district court erred in holding the statute facially unconstitutional for any reason not presented to us.

as DeKalb) do not contest the district court's holding that the statute is facially unconstitutional, nor that the DeKalb County schools engaged in unconstitutional officially organized or sponsored religious activities. Therefore, we do not review the district court's determinations of these issues.

Neither does DeKalb appeal that portion of the Permanent Injunction entered by the district court which prohibits it from "aiding, abetting, commanding, counseling, inducing, ordering, or procuring . . . school organized or officially sanctioned religious activity in its schools including, but not limited to, vocal prayer, Bible and devotional or scriptural readings, distribution of religious materials, texts, or announcements, and discussions of a devotional or inspirational nature, in school or at school-related events, to include assemblies, sporting events, and graduation ceremonies." Apparently, DeKalb concedes that, under Supreme Court precedent, it may not prescribe prayer or allow state employees to lead, participate in or otherwise endorse prayer of any type during curricular or extracurricular events.[4] *See Lee v. Weisman*, 505 U.S. 577, 586 (1992); *County of Allegheny v. ACLU*, 492 U.S. 573, 594 (1989); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995).

The Permanent Injunction, however, also prohibits DeKalb from "permitting" vocal prayer or other devotional speech in its schools. While the injunction makes clear that it

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[4] We do not, therefore, reach any of these issues.

does not prohibit students from voluntarily praying while at school or at school-related events, either individually or with each other, so long as the prayer is purely *private*,[5] it prohibits all prayer or other devotional speech in situations which are not purely private, such as aloud in the classroom, over the public address system, or as part of the program at school-related assemblies and sporting events, or at a graduation ceremony. Furthermore, the prohibition applies to bar not only school personnel from leading or participating in such public or vocal prayer or other devotional speech or Bible reading, but also *requires school officials to forbid students*[6] *or other private individuals from doing so while in school or at school-related events.*

DeKalb does appeal this portion of the Permanent Injunction. It contends that the district court may not constitutionally require it to forbid this speech, pointing out that the Supreme Court has made very clear that "[p]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private

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[5] The Permanent Injunction recites that nothing in it should be read to "affect the rights of secondary-school students to engage in religious activity during noninstructional time that is consistent with the federal Equal Access Act, 20 U.S.C. § 4071 *et seq.*, or to quietly engage in religious activity during noninstructional times." Permanent Injunction at 4.

[6] We shall refer to all non-government, private parties collectively as "students."

expression." *Capital Square Review Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).[7] "There is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990) (quoting *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987)) (emphasis in original).

Even the Chandlers agree that "[t]he Establishment Clause does not ban prayer. It bans *state* prayer." (Plaintiffs'

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[7] The Departments of Justice and Education issued a statement of principles in the summer of 1995 "to provide school officials with guidance [concerning] the extent to which religious expression and activities are permitted in public schools." The first paragraph of the statement advises:

> Student prayer and religious discussion: The Establishment clause of the First Amendment does not prohibit purely private religious speech by students. Students therefore have the same right to engage in individual or group prayer and religious discussion during the school day as they do to engage in other comparable activity. For example, students may read their Bibles or other scriptures, say grace before meals, and pray before tests to the same extent they may engage in comparable non-disruptive activities. Local school authorities possess substantial discretion to impose rules of order and other pedagogical restrictions on student activities, but they may not structure or administer such rules to discriminate against religious activity or speech.

News Release of U.S. Dep't of Educ., Aug. 17, 1995, at 3.

Reply Brief) (emphasis in original). They contend, however, that student-initiated religious speech in the public schools *is* state prayer, and, therefore, DeKalb may not permit it.

Our review of the Permanent Injunction, then, is limited to the issue of whether the district court may constitutionally enjoin DeKalb from permitting student-initiated religious speech in its schools.[8] For the following reasons, we hold the court may not. We vacate the Permanent Injunction and remand for further proceedings.

II.

The district court's opinion holds that the Constitution requires it to prohibit public religious speech in schools because the Establishment Clause is violated if government permits religious speech – even if initiated by students – in schools or at school-related events. DeKalb contends that this conclusion is wrong for two reasons. First, students are not state actors and, therefore, by definition, their actions cannot tend to "establish" religion in violation of the Establishment Clause. Second, the Free Speech and Free Exercise Clauses of the First Amendment require the State to *tolerate* genuinely student-initiated religious speech in schools.

Students as State Actors and the Establishment Clause

The Establishment Clause prohibits Congress – or any other governmental body – from acting in such a way as to

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[8] DeKalb also appeals the district court's decision to appoint a monitor to enforce its injunction which we discuss below.

establish a religion. *Everson*, 330 U.S. at 8. DeKalb argues that because students are not state actors – Congress or a governmental body – their religious speech cannot, by definition, tend to establish a religion.

It is true that ordinarily religious speech by private parties cannot establish religion, even if it occurs in a public institution, such as a school. *Mergens*, 496 U.S. at 250. On the other hand, it is clear that private parties' religious speech can violate the Establishment Clause if the State uses such parties as surrogates to accomplish what the State may not do. For example, if a school board may not constitutionally write and require students to recite a prayer, as it most assuredly may not, *Engel v. Vitale*, 370 U.S. 421 (1962), the school board may not avoid this prohibition by delegating this function to others. *Lee*, 505 U.S. at 577 (invalidating school board policy permitting clergy to give prayers at graduation); *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981) (invalidating school board guidelines which required student or teacher-led prayers in classrooms). Nor may the State establish a policy which "permits" private parties to speak, but then limits their speech to prayer or other devotional speech. *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 277 (5th Cir. 1996) (authorizing *invocations, benedictions and prayers*); *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) (school board policy permitted students to vote to have *prayer* at graduation); *Harris v. Joint Sch. Dist.*, 41 F.3d 447 (9th Cir. 1994), *vacated as moot*, 515 U.S. 1155 (1995) (school policy permitted student to lead

prayer); *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (11th Cir. 1989) (authorizing student-led *invocations* and *only* invocations at school sporting events); *Hall v. Board of Sch. Comm'rs*, 656 F.2d 999 (5th Cir. 1981) (school policy permitted *devotionals*, and only devotionals); *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759, 760-61 (9th Cir. 1981) (authorizing *invocations*, *benedictions*, and *prayers* only).

When the State *commands* religious speech, it steps over the Constitution to establish religion. In each of these cases, it is the *State's decision to create an exclusively religious medium* which violates the Establishment Clause; *not* the private parties' religious speech. It is not the "permitting" of religious speech which dooms these policies, but rather the *requirement* that the speech be religious, i.e., invocations, benedictions, or prayers.

This was the holding of the original school prayer case, *Engel v. Vitale*, in which the Court observed:

> The Petitioners contend among other things that the state laws requiring or permitting use of the Regents' prayer must be struck down as a violation of the Establishment Clause because that prayer was composed by governmental officials as a part of a governmental program to further religious beliefs. For this reason, petitioners argue, the State's use of the Regents' prayer in its public school system breaches the constitutional wall of separation between Church and State. We agree with that contention since

> we think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country *it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.*

370 U.S. at 425 (emphasis supplied). The Court held, therefore, that "government in this country, be it state or federal, is without power to *prescribe by law any particular form of prayer which is to be used as an official prayer* in carrying on any program of governmentally sponsored religious activity." *Id.* (emphasis supplied). This is all it held.

Some lower courts have extended *Engel* to require government to prohibit *any* public expression of religious belief in schools. Support for this holding is said to be located in the Court's observation that the denominational neutrality of the prayer did not "free it from the limitations of the Establishment Clause." *Id.* at 430. These courts interpreted this to mean that *no* religious speech could be tolerated in the public schools because the Establishment Clause forbade it.

This is not what the Court said, however. The denominational neutrality of the Regent's prayer could not "free it from the limitations of the Establishment Clause" because the prayer was "commanded" by the State. It really did not matter what the prayer said; *no* prayer commanded by the State can survive scrutiny under the Establishment Clause.

The Court specifically cautioned that "nothing could be more wrong" than to interpret *Engel* to require "a hostility toward religion *or toward prayer.*" *Id.* at 434 (emphasis supplied). On the contrary, "[t]he history of man is inseparable from the history of religion." The First Amendment, "which tried to put an end to governmental control of religion and of prayer, was not written to destroy either." *Id.* at 435. Rather, it protects freedom of religious expression by forbidding *government* from requiring us to "speak only the religious thoughts that government want[s] [us] to speak and to pray only to the God that government want[s] [us] to pray to." *Id.* The Court summarized its holding in *Engel* in the following way:

> It is neither sacrilegious nor antireligious to say that each separate *government in this country should stay out of the business of writing or sanctioning official prayers* and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.

Id. (emphasis supplied). Thus, *Engel* merely made clear that the Establishment Clause prohibits the government from commanding prayer and prescribing its form.[9]

But DeKalb does not claim otherwise. DeKalb contends

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[9] The opt-out provision of the school board's policy was constitutionally insignificant in the context of "governmentally composed prayers for religious services" in schools. 370 U.S. at 425.

only that nothing in the First Amendment, nor in any of the Supreme Court's interpretations of it, requires it to prohibit the religious speech of private parties – such as students – if that speech is genuinely privately-initiated, i.e., not commanded by a school board or state law. On the contrary, DeKalb argues, the First Amendment positively *requires* that it tolerate students' religious speech to the same extent that it permits students' secular speech.

The Chandlers, on the other hand, contend that when the State permits students to speak religiously in situations that are not purely private,[10] the State lends its imprimatur to the speech, thereby endorsing and advancing religion in violation of the "obligation of the public schools to provide a religiously neutral environment." They also argue that all public religious speech in schools is unconstitutionally coercive of some students because of "peer pressure." Consequently, schools must forbid all public religious speech in school, including genuinely student-initiated religious speech.

Student Speech and the Free Exercise and Free Speech Clauses

This, then, is the question DeKalb asks us to answer. Do school officials have "the ability (and duty) to impose content restrictions on purportedly 'private' speakers at school events," in order to achieve neutrality with respect to religion as

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[10] The Permanent Injunction, for example, permits students to "quietly engage in religious activity during noninstructional times, so long as it does not unduly call attention thereto."

the Chandlers contend (Chandlers' Brief at 27); or do the Free Exercise and Free Speech Clauses require that school officials permit student religious speech at the same time, and in the same place and manner as secular speech, as DeKalb contends? Under the Chandlers' theory, student religious speech is attributable to the State thereby violating the constitutional requirement of neutrality. Students, therefore, cannot be permitted to speak freely in school if religion is the topic; the State has a positive duty to censor student speech if it is religious.

We disagree. The suppression of student-initiated religious speech is neither necessary to, nor does it achieve, constitutional neutrality towards religion. For that reason, the Constitution does not permit its suppression.

It is true that government must be neutral with respect to religion. But it is equally true, as Justice Goldberg warned, that an:

> untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive dedication to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.

School Dist. of Abington Township v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J. concurring).

The discriminatory suppression of student-initiated religious speech demonstrates not neutrality but hostility toward religion because the:

> exclusion of religious ideas, symbols, and voices marginalizes religion . . . . Silence about a subject conveys a powerful message. When the public sphere is open to ideas and symbols representing nonreligious viewpoints, culture, and ideological commitment, to exclude all those whose basis is "religious" would profoundly distort public culture.

Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 189 (Winter 1992).

The prohibition of all religious speech in our public schools implies, therefore, an unconstitutional *disapproval* of religion. If endorsement is unconstitutional because it "sends a message to nonadherents that they are outsiders," disapproval is unconstitutional because it "sends the opposite message." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). "What is crucial is that a government practice not have the effect of communicating a message of government endorsement *or* disapproval of religion." *Id.* at 692 (emphasis supplied). "Cleansing" our public schools of all religious expression, however, inevitably results in the "establishment" of disbelief – atheism – as the State's religion. Since the Constitution requires

neutrality, it cannot be the case that government may prefer disbelief over religion.[11]

Permitting students to speak religiously signifies neither state approval nor disapproval of that speech. The speech is not the State's – either by attribution or by adoption. The permission signifies no more than that the State acknowledges its constitutional duty to tolerate religious expression. Only in this way is true neutrality achieved.

Because genuinely student-initiated religious speech is private speech endorsing religion, it is fully protected by both the Free Exercise and the Free Speech Clauses of the Constitution. *See Mergens*, 496 U.S. at 250; *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992). "Students do not shed their constitutional rights . . . at the schoolhouse gate." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969). Religious speech by students does not become forbidden "state action" the moment

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[11] We believe that the First Amendment's requirement that government "tolerate" diverse political views, including those that are totally antithetical to our constitutionally guaranteed republican form of government, applies to require that government "tolerate" atheistic views without also requiring that we eschew religion. Tolerance of disbelief does not require that we deny our religious heritage, nor elevate atheism over that heritage. The First Amendment requires only that the State tolerate both, while establishing neither. Americans, however, are free to prefer one or the other and to express that preference wherever they are permitted to speak. This means, of course, that a student may choose to express his atheistic views as well as his religious ones.

the students walk through the schoolhouse door.

Furthermore, the Supreme Court has made clear that permitting religious speech or symbols in our public institutions does not automatically constitute an unconstitutional State endorsement of religion. In fact,"[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch v. Donnelly*, 465 U.S. 668, 674 (1983). References to our religious heritage are found in the statutorily prescribed national motto on our currency, "In God We Trust," 36 U.S.C. § 186, and in the language "one nation under God," which is part of the Pledge of Allegiance to our flag – recited by public school children every day. Congress opens with a prayer, and, indeed, the Supreme Court, itself, hears oral argument in a chamber decorated with a depiction of Moses and the Ten Commandments. We celebrate Thanksgiving and Christmas as national holidays, and Congress has directed the President to proclaim a National Day of Prayer each year "on which [day] the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals." 36 U.S.C. § 169h.

The Constitution does not require a complete separation of church and state such that religious expression may not be tolerated in our public institutions.[12] In fact, "it affirmatively

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[12] In fact, the Constitution probably does not require a "wall" at all. The phrase comes from a letter written by Jefferson who was neither present

mandates *accommodation*, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch*, 465 U.S. at 673 (emphasis supplied). The Supreme Court has made clear that "[a]nything less would require the 'callous indifference' we have said was never intended by the Establishment Clause," and "would bring us into 'war with our national traditions as embodied in the First Amendment's guaranty of the free exercise of religion.'" *Id.* (quoting *McCollum v. Board of Education*, 333 U.S. 203, 211-12 (1948)).

The examples cited above all "evidence [our] accommodation of all faiths and all forms of religious expression, and hostility toward none. Through this accommodation . . . governmental action has 'follow[ed] the best of our traditions' and 'respect[ed] the religious nature of our people.'" *Lynch*, 465 U.S. at 677-78 (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)). Genuinely student-initiated religious speech can also be accommodated without resulting in an unconstitutional State endorsement of religion.

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when the First Amendment was passed, nor consulted about its language. In a short note to the Danbury Baptist Association written fourteen years after the Bill of Rights was passed, he made a passing reference to idea that the First Amendment "build[s] a wall of separation between church and State." *See Wallace v. Jaffree*, 472 U.S. 38, 92 (Rehnquist, J., dissenting). In any event, the "wall" concept has been acknowledged by the Court itself, with what Justice Rehnquist characterized as "embarrassing candor," as merely a "blurred, indistinct, and variable barrier," which "is not wholly accurate" and can only be "dimly perceived." *Id.* at 107 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)).

Furthermore, even if permitting student-initiated religious speech advances religion in some sense, this does not mean the speech violates the Establishment Clause. Even *State* action may incidentally advance religion without offending the Constitution. *Widmar v. Vincent*, 254 U.S. 263 (1981). The Supreme Court has recognized that "our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action." *Lynch*, 465 U.S. at 683. "Not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid." *Id.* (quoting *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973)). Student-initiated religious speech, therefore, even if it incidentally advances religion, does not violate the Establishment Clause because it is private speech endorsing religion which the First Amendment protects. *See Clear Creek*, 977 F.2d at 965.

Finally, the fact that student religious speech may fall on deaf ears does not make it unconstitutionally coercive. *Lee*, 505 U.S. at 577. In *Lee*, the Supreme Court was careful to point out that:

> We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation. We know

> too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity.

505 U.S. at 597.[13] Those who do not espouse a speaker's religious beliefs are free not to listen, and to express their disagreement by not participating in any way.

Accommodation of religious beliefs we do not share is, however, a part of everyday life in this country:

> In so acting, we express respect for, but not endorsement of, the fundamental values of others. We act without expressing a position on the theological merit of those values or of religious belief in general, and no one perceives us to have taken such a position.

Lee, 505 U.S. at 628 (Souter, J. concurring). Respect for the rights of others to express their beliefs, both political and religious, is the price the Constitution extracts for our own liberty.[14] This is a price we freely pay. It is not coerced.[15] Only

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[13] Of course, in this case we do not have state action. Private religious speech has even less potential for coercion.

[14] Justice Scalia observed in *Lee* that "We indeed live in a vulgar age. But surely 'our social conventions,' have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence. . . . I may add, moreover, that maintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate – so that even if it were the case that the

when the speech is commanded by the State does it unconstitutionally coerce the listener.[16]

Ultimately, the issue in this case is not whether school officials may prescribe prayer or enlist surrogates to that end. They may not. Nor is the issue whether school officials may prohibit religious speech in schools, or censor the content of that speech. They may not. The real issue is what sort of time, place, and manner limits may be imposed upon genuinely student-initiated religious speech in schools? When may students pray? Where may they pray? Under what circumstances may they pray?

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displaying of such respect might be mistaken for taking part in the prayer, I would deny that the dissenter's interest in avoiding even the false appearance of participation constitutionally trumps the government's interest in fostering respect for religion generally." 505 U.S. at 637-38 (Scalia, J. dissenting).

[15] Justice Souter acknowledged this in *Lee*: "If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State. But that is not our case." 505 U.S. at 630 n. 8.

[16] The "indirect coercion" identified in *Lee* by the plurality opinion was exerted over the audience by the *State*'s command that there be religious speech at graduation. 505 U.S. at 592-93. Justice Kennedy's concern that "*in the hands of government* what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce," *id.* at 591-92 (emphasis supplied), does not apply to the case of student-initiated religious speech.

In answering these questions, we must fulfill the constitutional requirement of *permitting* students freely to express their religious beliefs without allowing the machinery of government – the school – to be used to command prayer. This requires that we resolve the tension between the right to pray and the right to be free from government-mandated prayer. This is not an easy task. It would be easy simply to banish prayer from our public institutions, but this would be not only constitutionally incorrect, but also fundamentally unfair to our society.

III.

How, then, does a school accommodate religious expression without commanding it? DeKalb argues that the answer is simple – it is to be "permitted." Not required. Not commanded. Not even suggested. Simply, permitted. If students, or other private parties, wish to speak religiously while in school or at school-related events, they may exercise their First Amendment right to do so.

The first principle must always be that genuinely student-initiated religious speech must be *permitted*. A student's individual decision to pray or otherwise speak religiously is not the State's command. *Clear Creek*, 977 F. 2d at 965.[17] Such

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[17] The Ninth Circuit also upheld a policy that permitted the top four students to speak on any topic of their choosing without state approval in *Doe v. Madison Sch. Dist.*, 147 F.3d 832 (9th Cir. 1998), but the court en banc ordered the district court to dismiss the complaint for lack of standing and mootness. No. 97-35642 (9th Cir. May 19, 1999).

speech is fully protected. *Id.* *See also Mergens*, 496 U.S. at 252.

On the other hand, even genuinely student-initiated religious speech may constitute state action if the State *participates in or supervises* the speech. *See Duncanville*, 70 F.3d at 406-07.[18] Religious speech in school by teachers, for example, is especially troublesome because "a teacher's [religious] speech can be taken as directly and deliberately representative of the school." *Bishop v. Aronov*, 926 F.2d 1066, 1073 (11th Cir. 1991). Teacher participation in student-initiated prayer "improperly entangles the State in religion and signals an unconstitutional endorsement of religion."

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[18] While many subsequent courts have cited *Duncanville* for the proposition that student-initiated speech at school-related sporting events is *un*constitutional, the Fifth Circuit specifically held that, "[s]tudents *may voluntarily pray together*, provided such prayer is not done with school participation or supervision." 70 F.3d at 405 (emphasis supplied). Judge Jones, in her separate concurrence and dissent, pointed out that:

> This decision . . . does not prevent students from exercising their constitutional rights of free speech, association and free exercise by praying at appropriate times and in an appropriate manner during athletic practices or games. Further, we must abide by the Supreme Court's decisions . . . that prevent active school leadership, encouragement or promotion of the prayers. The only questions here are how teachers may respond to student-initiated prayers and to what extent the school may "supervise" the prayers.

70 F.3d at 409.

Duncanville, 70 F.3d at 406. In upholding the Equal Access Act, which provides that schools must afford religious groups the same access to school facilities as secular groups enjoy, the Supreme Court relied in part on the act's express prohibition on teacher participation which "avoids the problems of the 'students' emulation of teachers as role models.'" *Mergens*, 496 U.S. at 251 (quoting *Edwards*, 482 U.S. at 584). Therefore, student religious speech must be without oversight, without supervision,[19] subject only to the same reasonable time, place, and manner restrictions as all other student speech in school.

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[19] What constitutes "supervision?" As Judge Jones wrote in *Duncanville*:

> At a broad level, everything that goes on during practice or competition, including student-initiated locker-room or basketball court prayer, is subject to the coaches' "supervision." To outlaw supervision on this level would be to outlaw the otherwise constitutional student-led prayers. . . . It must be, then, that the injunction pertains only to active supervision and is thus redundant of the cautions that the school may not promote, encourage or lead prayers.

70 F.3d 410.

Supervision cannot mean, therefore, mere presence. Support for this view is found in *Mergens* in which the Supreme Court found no constitutional infirmity with the provision of the EAA which permits school employees to be present for custodial purposes at religious meetings held on school property. 496 U.S. at 236. We agree with Judge Jones that, for supervision to amount to unconstitutional endorsement, it must cross the line into active endorsement, encouragement or participation.

Because religious speech is protected speech, government may not censor its content. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)) (the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses). Suppression of religious speech constitutes viewpoint discrimination, the most egregious form of content-based censorship. *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995). Government may not, therefore, censor religion from the content of students' protected speech at school. *Cornelius*, 473 U.S. at 806 ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are *viewpoint neutral*.") (emphasis supplied); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (A "state may reserve the [nonpublic] forum for its intended purposes . . . as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.")

A student's right to speak religiously is not, however, without limit. The school may impose the same reasonable restrictions on the time, place, and manner of religious speech as it does on secular student speech. Furthermore, a student's right to express his personal religious beliefs does not extend to using the machinery of the state as a vehicle for converting his

audience. *See Abington*, 374 U.S. at 228. The Constitution requires that schools permit religious expression, not religious proselytizing. "The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Lee*, 505 U.S. at 587. Proselytizing speech is inherently coercive and, the Constitution prohibits it from the government's pulpit. *Id.*

IV.

The Permanent Injunction enjoins DeKalb from "aiding, abetting, commanding, counseling, inducing, ordering, or procuring" school organized or officially sanctioned religious activity. DeKalb does not appeal this prohibition. The record in this case reveals, however, that there were many sincere, but unconstitutional efforts by school personnel to do just what the injunction prohibits – to endorse, encourage, or participate in student religious activity. For this reason, the appointment of a monitor by the district court was not an abuse of discretion. *See Local 28 of the Sheet Metal Workers' Int'l v. EEOC*, 478 U.S. 421, 481-82 (1986). The monitor's task is to be vigilant in guarding against the repetition of this unconstitutional activity by the schools.

The Permanent Injunction also forbids DeKalb from "permitting" students to speak religiously. This it cannot constitutionally do. So long as school personnel do not participate in or actively supervise student-initiated speech, DeKalb cannot constitutionally prohibit students from speaking

religiously and the Permanent Injunction cannot require it to.

We do not undertake to re-write the Permanent Injunction. The district court is in the best position to do that. We note only that the Permanent Injunction may neither prohibit genuinely student-initiated religious speech, nor apply restrictions on the time, place, and manner of that speech which exceed those placed on students' secular speech.[20]

Accordingly, the Judgment of the district court is AFFIRMED as to the Governor's appeal. As to the remaining defendants' appeals, the Permanent Injunction is VACATED and the case is REMANDED for further proceedings not inconsistent with this opinion.

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[20] This includes restrictions on announcements permitted in the schools' commencement programs, and the distribution of religious literature.

TJOFLAT, Circuit Judge, specially concurring:

I agree wholeheartedly with the majority's analysis in this case. I write separately, however, to emphasize a more fundamental error made by the district court. I believe that many provisions of the injunction entered by the district court were entered in violation of basic principles of equity jurisprudence and constitutional law – namely, the principle that equity will not intervene where there is an adequate remedy at law and the constitutional principle of separation of powers. These principles, for reasons that will be explained hereafter, lead to the conclusion that a court should not enter an injunction that cannot be enforced through coercive contempt sanctions. Some of the injunctive provisions at issue here cannot be so enforced, and therefore must be vacated.[1]

In part I of this concurrence, after recognizing that injunctions are enforced through contempt sanctions, I discuss the types of contempt sanctions generally available to a judge. I then explain that the types of contempt sanctions available to address a violation of a particular injunction depend on the nature of the injunction; not all types of sanctions are available for all injunctions. Finally, I explain why, based on equitable and constitutional considerations, an injunction should be

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[1] The issues I discuss herein were properly not relied upon by the majority opinion for the simple reason that they were not raised by the appellants either in the district court or on appeal. They are, however, sufficiently important to our system of jurisprudence that I feel it is appropriate – indeed necessary – to address them sua sponte in this concurrence.

entered as a form of relief for a party to a lawsuit only when one type of contempt sanction – coercive – is potentially available for violations. Part II then applies this rule to the facts of this case.

I.

Injunctions are enforced through contempt sanctions. See 18 U.S.C. § 401(3) (1994). When it comes to a judge's attention that an individual may not be in compliance with an injunction he has entered, he holds a "show cause" hearing at which the allegedly noncomplying individual is asked to show cause why he is disobeying the injunction. If the individual is in fact disobeying the injunction, and he is unable to provide an acceptable excuse for doing so, then he is subject to the contempt powers of the court.[2] In this part, I discuss the types of contempt sanctions available to a court, and then discuss how this should impact the court's decision whether to grant injunctive relief in the first instance.

A.

Contempt sanctions take one of three forms: punitive, compensatory, or coercive. Punitive sanctions punish the contemnor for his conduct, and are imposed for the purpose of vindicating the authority of the court. See Gompers v. Buck's

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[2] This procedure is laid out in more detail in Wyatt v. Rogers, 92 F.3d 1074, 1078 n.8 (11th Cir. 1996).

Stove & Range Co., 221 U.S. 418, 441, 31 S. Ct. 492, 498, 55 L. Ed. 797 (1911).[3] For instance, if an individual is served with a subpoena duces tecum but refuses to produce the requested documents, and the court subsequently holds him in contempt and imposes a flat fine of $50 (payable to the court) for his contempt, the contempt sanction is properly classified as punitive. See Penfield Co. of Cal. v. SEC, 330 U.S. 585, 592-93, 67 S. Ct. 918, 922, 91 L. Ed. 1117 (1947). In such a situation, the opposing party is provided no relief, because it gets neither the requested documents nor the proceeds from the fine. Furthermore, the contemnor has no way to purge the contempt (in other words, avoid the fine); if he produced the requested documents five minutes after the court's decision, he would still be required to pay $50. The sanction in such a case is intended to punish the contemnor for his contempt, thereby vindicating the court's authority and thus deterring the contemnor and others from violating subsequent judicial orders (issued by the same or any other court). Punitive sanctions are criminal in nature and therefore many of the constitutional protections available in criminal proceedings – including the presumption of innocence, the privilege against self-incrimination, the right to counsel, and the right to a jury trial in serious cases – must be provided to the alleged contemnor

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[3] The principles set forth in Gompers have been recently reaffirmed in International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 826-29, 114 S .Ct. 2552, 2556-58, 129 L. Ed. 2d 642 (1994).

before such sanctions can be imposed. See Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 798-99,107 S. Ct. 2124, 2133, 95 L. Ed. 2d 740 (1987).[4]

The second form of contempt sanction is compensatory. Compensatory sanctions are civil in nature and compensate the plaintiff for the damage caused by the contemnor's contempt. See United States v. United Mine Workers of Am., 330 U.S. 258, 303-04, 67 S. Ct. 677, 701, 91 L. Ed. 884 (1947). The contempt sanction in the well-known case of Jones v. Clinton, 36 F. Supp. 2d 1118 (E.D. Ark. 1999), falls into this category. In that case, the court, having found that the defendant gave false deposition testimony, held the defendant in contempt. The punishment for the contempt was a payment to the plaintiff of the expenses (including attorney's fees) caused by the false testimony. See id. at 1134-35. Compensatory sanctions, unlike punitive sanctions, provide a direct benefit to the plaintiff. Like punitive sanctions, however, the contemnor is unable to purge

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[4] As stated in Young:

> [D]efendants in criminal contempt proceedings must be presumed innocent, proved guilty beyond a reasonable doubt, and accorded the right to refuse to testify against themselves; must be advised of charges, have a reasonable opportunity to respond to them, and be permitted the assistance of counsel and the right to call witnesses; must be given a public trial before an unbiased judge; and must be afforded a jury trial for serious contempts.

Young, 481 U.S. at 798-99, 107 S .Ct. at 2133 (citations omitted).

his contempt: Were President Clinton now to amend his deposition answers to make them completely accurate, the contempt sanctions would nevertheless remain in force.

The third form of contempt sanction is coercive. Coercive sanctions are also civil in nature, and are intended to coerce the contemnor into doing an act that he is already required to do, but refuses to perform. See Gompers, 221 U.S. at 441-42, 31 S. Ct. at 498. Thus, to use the previously cited example from Penfield, if the district court had ordered the recipient of the subpoena duces tecum to pay a fine of $50 per day for every day the recipient failed to produce the requested documents, such a sanction would be coercive.[5] Coercive sanctions benefit the plaintiff by pressuring the defendant into performing an action that the plaintiff desires to have performed. See id. at 442, 31 S. Ct. at 498. They also give the contemnor the opportunity to purge his contempt: The punishment continues only as long as the contemnor refuses to comply with the relevant court order. Hence, in regard to coercive sanctions, it is often said that a contemnor carries the key to his prison in his own pocket. See, e.g., Blalock v. United States, 844 F.2d 1546, 1559 (11th Cir. 1988) (Tjoflat, J., specially concurring) (quoting In re Nevitt, 117 F. 448, 461 (8th Cir. 1902)).

The lines separating each type of sanction from the

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[5] The fine would presumably be paid to the court, although in theory it could be paid to the opposing party. Regardless of who received the money, because the clear purpose of the fine would be to pressure the contemnor into compliance, the fine would be classified as coercive.

others are not always clear. Consider a situation in which a court imposes a $150 contempt sanction on a party, payable to the adverse party but in no way correlated to the harm suffered by that party. The fact that the sanction is payable to the adverse party (and not the court) makes the sanction appear compensatory, but the fact that the amount of the sanction is unrelated to the harm suffered by the adverse party leads to the conclusion that the sanction is in fact punitive. Cf. Thyssen, Inc. v. S/S Chuen On, 693 F.2d 1171, 1173-74 (5th Cir. 1982). Furthermore, every contempt sanction serves to some degree to vindicate the authority of the court (and thus is somewhat punitive) and to dissuade the contemnor from repeating his misbehavior (and thus is somewhat coercive). See Gompers, 221 U.S. at 443, 31 S. Ct. at 498. One might argue that this fact renders meaningless the distinctions among the types of contempt sanctions – for instance, because all contempt sanctions are somewhat punitive, it makes no sense to distinguish punitive contempt sanctions from the other two types of contempt sanctions. This, however, is the equivalent of arguing that because all men have facial hair, it makes no sense to distinguish between bearded and non-bearded men. In both cases, the question is one of degree, and the fact that there will be difficult cases at the margins does not deprive the conceptual categories of their significance. Instead, difficult cases merely require a detailed "examination of the character of" the sanction being imposed in order to determine whether it is punitive, compensatory, or coercive. Hicks v. Feiock, 485 U.S. 624, 636,

108 S. Ct. 1423, 1432, 99 L. Ed. 2d 721 (1988).

B.

The types of sanctions – punitive, compensatory, or coercive – that can be used to enforce an injunction depend on the character of the conduct being enjoined. Consider first an injunction that commands the performance of a specific act. For instance, imagine a case in which the defendant operates a paper mill that is discharging pollutants onto the plaintiff's land. The plaintiff brings a lawsuit alleging a nuisance, and seeks an injunction ordering the defendant to shut down the mill. The plaintiff succeeds and the injunction is granted. The defendant, however, continues to operate the paper mill. The court, after conducting a show cause hearing and finding the defendant in contempt, could use any of the types of sanction previously discussed: a punitive sanction (such as a flat fine of $10,000), a compensatory sanction (such as a fine of $5,000, which is roughly equal to the harm caused, payable to the plaintiff), or a coercive sanction (such as a fine of $100 per day until the paper mill is shut down).

Next, consider an injunction that forbids the performance of a specific act. For instance, imagine a case in which an employee alleges that her corporate employer, through the actions of its CEO (who is also the majority shareholder), has, on a number of occasions, touched her in inappropriate areas. The employee claims that this behavior constitutes sexual

harassment, in violation of 42 U.S.C. § 2000e-2(a)(1) (1994).[6] She files a lawsuit against her employer, seeking an injunction ordering the employer to cease the harassment.[7] She succeeds, and the injunction is granted. Nevertheless, the CEO continues the inappropriate touching. The court, after conducting a show cause hearing and finding the employer in contempt, can assess punitive sanctions (such as a flat fine of $10,000, payable to the court) or compensatory sanctions (such as a fine equal to the harm caused, payable to the employee). Coercive sanctions, however, are not available, because the act to be prevented by the injunction has already occurred – in other words, there is no

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[6] The employee's claim would be that the CEO had created an "abusive work environment," as opposed to a claim of quid pro quo sexual harassment. See generally Harris v. Forklift Systems, Inc., 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (discussing "abusive work environment" claims).

[7] Injunctions of this sort actually amount to nothing more than injunctions to "obey the law," which, for reasons different from those outlined here, have repeatedly been held invalid. See, e.g., Payne v. Travenol Labs., Inc., 565 F.2d 895, 897-98 (5th Cir. 1978) (holding that injunctions to "obey the law" violate the requirements of Fed. R. Civ. P. 65(d) that an injunction "be specific" and "describe in reasonable detail . . . the act or acts sought to be restrained"). (In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.)

way to purge the contempt.[8] See Gompers, 221 U.S. at 442, 31 S. Ct. at 498 ("[I]f the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. [Contempt sanctions] cannot undo or remedy what has been done . . . .").

To make the point clearer, try to imagine a court attempting to enter coercive sanctions in the situation outlined above. The court has enjoined the employer not to harass the employee. The employer nevertheless does so, and, after a show cause hearing, is held in contempt. The court fines the employer $100 per day until . . . well, until what? Presumably, until the court is persuaded that the harassing CEO will not repeat his misbehavior. Thus, after three days of fines, the CEO contacts the judge and promises that he will never again sexually harass the employee. The court thinks the CEO was shifting his eyes a bit much when he made the promise, however, and therefore allows the fines to continue accumulating. After a week of fines, the CEO makes the same promise, but this time on his knees and with his hands clearly visible so that the court can see that the CEO's fingers are not crossed. The court is still unpersuaded, and continues allowing the fines to accrue. This

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[8] The situation might be different depending on the nature of the harassment. For instance, if the harassment consisted in part of the placement of pornographic pictures throughout the office, the employee could seek an injunction ordering that the pictures be removed. If the injunction was granted, it could be enforced through coercive sanctions – for instance, a fine of $200 per day until the pictures were removed.

exercise would presumably continue until such time as the court, for whatever reason, decided that the CEO had learned his lesson.[9] Even then, the contempt would not have been purged, because the harassment would already have been fully accomplished. The point is simply that when an injunction forbids the performance of an act, coercive sanctions are not available to enforce the injunction.

Note that it is not the affirmative or negative phrasing of the injunction that is critical. An injunction commanding the performance of specific act (for instance, "shut down the paper mill") could, in many cases, just as easily be phrased as an injunction prohibiting a ongoing harm (for instance, "do not operate the paper mill"). Likewise, an injunction forbidding the performance of a specific act (for instance, "do not sexually harass the employee") could, in many cases, be phrased as an injunction commanding the performance of an ongoing duty (for instance, "treat male and female employees equally"). Cf. International Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 835, 114 S. Ct. 2552, 2561, 129 L. Ed. 2d 642 (1994) (suggesting that an injunction directed at a union stating, "Do not strike," is essentially the same as one stating, "Continue working"). Rather, it is the underlying nature of the injunction – specifically, whether it is commanding an act that the law

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[9] In contrast, where the contemnor is enjoined to perform a specific act, promises of future compliance are neither necessary nor relevant – the contemnor can avoid sanctions by (and only by) performing the commanded act.

requires or proscribing an act that the law forbids – that determines whether it can be enforced through coercive sanctions.

In sum, if an injunction commands the performance of a specific act (such as shutting down a paper mill), then all three types of sanctions are available to the court. If, however, an injunction forbids the performance of an act (such as sexually harassing an employee), then only punitive and compensatory sanctions are available to the court.

C.

The types of contempt sanctions available for violation of an injunction determine the effectiveness of the injunctive relief being given to the plaintiff. Specifically, as I discuss in this section, injunctions that are enforceable only through punitive and compensatory sanctions provide relief to a plaintiff that is – at best – duplicative of the relief available through an action for damages.[10] Only injunctions enforceable through coercive sanctions provide a form of relief that is unique to equity. They are therefore the only type of injunctions that courts should enter, on the basis of the rule that injunctions should not be granted where the plaintiff has an adequate remedy at law. See Weaver v. Florida Power & Light Co., 172 F.3d 771, 773 (11th

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[10] This is not to say that punitive and compensatory sanctions should never be used to enforce injunctions. Some examples of their proper use will be discussed in part I.E, infra.

Cir. 1999).

Punitive sanctions provide essentially no relief to the plaintiff – as discussed above, the purpose of punitive sanctions is to vindicate the court's authority, not to benefit a party to a lawsuit. Any benefit to the plaintiff from such a sanction is incidental and indirect. For instance, in the sexual harassment hypothetical in part I.B, supra, assume that the court chose to impose a punitive sanction – such as a fine of $10,000 against the employer, payable to the court. This fine would do nothing to affect the harassment that had already occurred; at this point, the harassment is a "done deal" and the court cannot undo it. In addition, the fine would do nothing to compensate the plaintiff for the harm caused by the harassment. The only benefit provided to the plaintiff from the fine would be a deterrent: Because of the imposition of the fine, the employer might be less inclined to harass the plaintiff in the future. This deterrent, however, is equally available to the plaintiff through an action for damages: If, instead of seeking an injunction and then calling for a show cause hearing at which the employer was assessed punitive sanctions, the plaintiff had simply brought a damages action after the harassment occurred, the employer would be equally deterred. (Furthermore, the plaintiff would receive compensation for the harm caused, unlike in the injunction scenario.) In sum, every benefit that the plaintiff gets from an injunction enforced by punitive sanctions would be equally available in an action for damages.

Compensatory sanctions merely imitate the relief that

would be provided in a damages action. For instance, returning to the sexual harassment example, assume that the court chose to impose a compensatory sanction on the employer. The court, after hearing argument from both parties, determined that the damage to the plaintiff from the harassment was roughly $5,000, and ordered the employer to pay that amount to the plaintiff. The fine does not affect the prior harassment (it is again a "done deal"), but compensates the plaintiff for the harm she has suffered. In this situation, the relief provided to the plaintiff imitates that which would be provided in a damages action – in terms of both compensation to the plaintiff and as a future deterrent to the employer. Again, as with punitive sanctions, every benefit that the plaintiff gets from an injunction enforced by compensatory sanctions would be equally available from an action for damages.

Coercive sanctions, in contrast, provide meaningful and unique relief to the plaintiff. For instance, using the paper mill hypothetical from part I.B, supra, assume that the court chose to impose a fine of $100 per day on the defendant until he shut down the paper mill. The defendant is now subject to an ever-increasing pressure to take the action that the plaintiff seeks – a pressure that would not be available through an ordinary damages action. There is of course still no guarantee that the defendant will shut down the mill, but, because of the injunction, the plaintiff is able to exert greater pressure on the defendant to do so than would be possible in the absence of the injunction.

These observations lead to the conclusion that where an

injunction is enforceable only through punitive or compensatory contempt sanctions,[11] and not through coercive contempt sanctions, the injunctive remedy being given to the plaintiff is no better than the remedy he could have obtained in an after-the-fact action for damages. Therefore, the plaintiff necessarily has an adequate remedy at law – or at least a remedy at law that is no less adequate than the injunctive remedy.[12] Consequently,

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[11] As discussed in part I.B, supra, injunctions are enforceable only through punitive or compensatory contempt sanctions when they forbid the performance of an act (or command the performance of an ongoing duty).

[12] An injunction enforceable only through punitive or compensatory sanctions does give a plaintiff one benefit that a damages action cannot provide: an ex ante declaration of the rights of the parties. For instance, consider a case in which the defendant is preparing to remove some trees from a plot of land. The plaintiff, asserting that the land is his, seeks an injunction (based on the law of trespass) forbidding the defendant from removing the trees. The plaintiff succeeds and the injunction is issued. The defendant, having previously believed that the land was his, may now be persuaded to change his behavior. Thus, although the injunction would not be enforceable through coercive contempt sanctions (because it forbids the performance of an act), it would nevertheless have provided the plaintiff with meaningful relief in the form of an ex ante declaration of rights. If, however, this is the only form of relief being provided to the plaintiff, then the appropriate remedial vehicle is a declaratory judgment, not an injunction. See 28 U.S.C. § 2201 (1994).

The distinction is not merely a formal one: Injunctions, unlike declaratory judgments, implicate the court's contempt powers and thus subject the enjoined party to sanctions should he disobey. Declaratory judgments therefore do not raise the same separation-of-powers concerns

the principle that an injunction will not be entered where the plaintiff has an adequate remedy at law forbids the entering of an injunction under such circumstances.

D.

In addition to violating equitable principles, an injunction that is enforceable only through punitive or compensatory sanctions may also violate the Constitution. Specifically, such an injunction has the potential to run afoul of the constitutional doctrine of separation of powers.

An injunction forbidding the performance of a particular act must be based on a conclusion that the act forbidden, if performed, would constitute a violation of the law. Otherwise, the court would be enjoining the performance of a perfectly legal act, which the court is without authority to do.

If the law on which the injunction is based is legislatively created, then the legislature is likely also to have created rules regarding the means by which the law should be enforced and the appropriate sanction for a violation of the law. For instance, the harassing behavior of the hypothetical CEO in part I.B, supra, is illegal as a result of Section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1994). The procedure for enforcing Title VII is set forth in 42 U.S.C. § 2000e-5 (1994). Under that section, an employee alleging a Title VII violation must first file a charge with the Equal

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as injunctions, as discussed in part I.D, infra.

Employment Opportunity Commission ("EEOC"). If the EEOC decides not to bring a civil action against the employer, it must notify the aggrieved employee, who then has ninety days in which to bring a civil action on her own. See 42 U.S.C. § 2000e-5(f)(1). If the action is successful, the types of relief available to the employee are set forth in 42 U.S.C. § 2000e-5(g).[13]

Once the employee obtains an injunction that orders the employer to cease the harassment, however, she can completely circumvent the procedure prescribed by Congress. No notice to the EEOC is necessary; the employee need only request a show cause hearing from the court. If the employer is held in

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[13] Section 2000e-5(g) specifically authorizes injunctive relief for violations of Title VII. This provision could conceivably be read as congressional authorization of injunctive relief regardless of whether the plaintiff has an adequate remedy at law. The more reasonable reading of the provision is that it means merely that injunctive relief is allowed when the traditional equitable requirements are met – including the absence of an adequate remedy at law. See Sanchez v. Philip Morris Inc., 774 F. Supp. 626, 630-31 (W.D. Okla. 1991) (denying an injunction in a Title VII case on the ground that the plaintiff's legal remedies are adequate); cf. Hecht Co. v. Bowles, 321 U.S. 321, 329-30, 64 S. Ct. 587, 591-92, 88 L. Ed. 754 (1944) (holding, in regard to a similar provision in the Emergency Price Control Act, that the traditional rules of equity still apply to the granting of injunctions). Even if I am mistaken in this view, however, this means merely that Title VII is an exception to the general rule (much like securities law, see infra note 18) and takes nothing away from the broader point being made in the text.

contempt, the court can respond with compensatory or punitive sanctions. See supra part I.B. If the court imposes compensatory sanctions, the limitations on relief found in 42 U.S.C. § 2000e-5(g) will be inapplicable. Furthermore, the employer will have no means of raising many of the defenses that would be available in an ordinary civil action, such as laches. If the court imposes punitive sanctions, it will have effectively made criminal conduct that Congress has not deemed criminal (in light of the absence of statutory criminal punishments for violations of Title VII). Even if Congress had done so, the enforcement of the criminal law would be a matter for the executive branch, not the judicial branch.[14] Thus, regardless of whether the injunction is enforced through compensatory or punitive sanctions, the court has intruded on the province of the legislative and executive branches by altering the congressionally-created procedures and remedies for sexual harassment.[15]

In sum, an injunction enforceable only through punitive or compensatory sanctions constitutes an individualized criminal or civil law (respectively). This new law is duplicative of the existing law but with a different enforcement mechanism –

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[14] This is one of the reasons for the equitable principle that equity will not enjoin the commission of a crime. See 11A Charles Alan Wright et al., Federal Practice and Procedure § 2942, at 70-71 (2d ed. 1995).

[15] The court could avoid this problem only by conducting a contempt proceeding that, in every relevant way, duplicated a criminal or civil trial.

contempt proceedings – and thus creates an opportunity to use different procedures and to impose different sanctions from those contemplated by the legislature under the circumstances. Therefore, where the action being enjoined is a violation of statutory law, the entry of an injunction implicates the constitutional doctrine of separation of powers. See Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508 n.9, 110 S. Ct. 2510, 2517 n.9, 110 L. Ed. 2d 455 (1990) (noting that separation of powers requires "that Congress rather than the courts controls the availability of remedies for violations of statutes"); cf. NLRB v. Express Pub. Co., 312 U.S. 426, 435, 61 S. Ct. 693, 699, 85 L. Ed. 930 (1941) (noting that, except where a specific violation has been found, "Congress did not contemplate that the courts should, by contempt proceedings, try alleged violations of the National Labor Relations Act").

E.

In light of all I have just said, a few caveats are in order. First, I am not saying that punitive and compensatory contempt sanctions are never appropriate means for enforcing an injunction. For instance, if a party is enjoined to produce certain documents and then destroys those documents, coercive sanctions would no longer be available. Under those circumstances, a punitive contempt sanction would be an important means of vindicating the court's authority. The injunction nevertheless would have been appropriately entered, because coercive sanctions were a viable option at the time the

injunction was entered and thus the injunction provided meaningful relief to the adverse party.

Second, a court may enter an injunction that is not enforceable through coercive contempt sanctions when the court enters the injunction in aid of its jurisdiction. For instance, if a government official is enjoined to perform a certain act, and another individual tries to prevent the official from performing the act, the court could issue an injunction commanding the individual to cease his interference. Such an injunction would be appropriate despite not being enforceable through coercive sanctions, because the injunction was not entered as a form of relief for a party to a lawsuit, and thus there is no issue as to whether that party would have an adequate remedy at law. Cf. 18 U.S.C. § 1509 (1994) (authorizing injunctive relief against persons who forcefully interfere with the performance of duties under a court order, regardless of whether the conduct enjoined is also independently criminal).

Finally, I am not denying the importance of the injunction in modern jurisprudence. The principles outlined above would have permitted, for instance, the use of the injunction in school desegregation cases. In such cases, the defendants were enjoined to undertake a specific, albeit complex, act: Create a unitary school system. Theoretically, the defendants could have been jailed until such time as they

complied with the court's mandate.[16] Once the commanded act had been done, however, the court's mandate would have been fully obeyed and any contempt would have been purged.

F.

In conclusion, when a party seeks an injunction to create criminal and/or civil liability via the court's contempt powers, rather than to coerce an adverse party into taking an action required of it, that party is using the legal device of an injunction for a purpose for which it was not designed.[17] See Hecht Co. v. Bowles, 321 U.S. 321, 329, 64 S. Ct. 587, 592, 88 L. Ed. 754 (1944) ("The historical injunctive process was designed to deter, not to punish."). Such an injunction provides no relief for the

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[16] The more common approach was to require school districts to submit to the court a plan for creating a unitary school system; if the plan was approved by the court, the court would retain jurisdiction to see if implementation of the plan succeeded in fulfilling the court's mandate. See, e.g., Brown v. Board of Educ. of Topeka, Kan., 139 F. Supp. 468, 470 (D. Kan. 1955). When various obstacles prevented fulfillment of the mandate – for instance, outside interference or obstinacy by certain officials – courts often issued injunctions in aid of their jurisdiction (sometimes enforceable only through punitive contempt sanctions, as discussed supra) to ensure compliance with their initial orders.

[17] Indeed, if such an action were taken by a plaintiff deliberately, it would likely amount to the tort of abuse of process. Cf. Dykes v. Hosemann, 776 F.2d 942, 950 (11th Cir. 1985) (Tjoflat, J., concurring in part and dissenting in part).

plaintiff (or at least no relief that could not be obtained at law), and intrudes into areas constitutionally reserved for the legislative and executive branches. Therefore, when a court is faced with a request for injunctive relief, it should consider how the requested injunction is to be enforced. If the injunction cannot be enforced using coercive sanctions, then it should not be entered.[18]

II.

The appellants in this case challenge two sets of provisions in the injunction entered by the district court. The first set of injunctive provisions enjoins the members of the DeKalb County Board of Education and the employees of the DeKalb County school system (such as principals and teachers)

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[18] An exception that proves the rule can be found in the area of securities law. Most SEC enforcement actions are resolved by injunctions (entered pursuant to consent decrees) that order the defendant essentially to do nothing more than obey the securities laws. See, e.g., SEC v. Clifton, 700 F.2d 744, 746 (D.C. Cir. 1983). These injunctions allow the SEC to punish repeat offenders without having to bring a separate lawsuit for each offense; instead, the commission needs only to request a show cause hearing to obtain sanctions against the offender. See id. at 748. This practice is permissible, however, only because Congress has specifically authorized it in the Securities Act of 1933. See 15 U.S.C. § 77t(b) (1994); SEC v. Jones, 85 F.2d 17, 17 (2d Cir. 1936) (noting that, because of the Securities Act, the SEC need not allege the absence of an adequate remedy at law when seeking injunctive relief). This specific congressional authorization suggests that such a practice would be impermissible if not so authorized.

not to permit students to engage in various forms of religious activity.[19] For instance, the defendants were enjoined from "permitting . . . vocal prayer; Bible and religious devotional or scriptural readings; distribution of religious materials, texts, or announcements; and discussions of a devotional/inspirational nature" in the DeKalb County schools. The defendants were also enjoined from "permitting . . . prayers, invocations, benedictions, or devotional messages at graduation or commencement exercises." Similar provisions were included in regard to public-address systems and school-sponsored assemblies and events.

These provisions, for the reasons outlined in part I, were entered in error. It is clear that the provisions are not enforceable through coercive sanctions. For instance, assume that a DeKalb County school principal violates the injunction by "permitting" a student prayer at graduation.[20] Plaintiff Jesse

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[19] The members of the DeKalb County Board of Education (and their successors in office) are the defendants in the lawsuit. The injunction extends to the employees of the school system on the ground that they are "in active concert and participation with" the defendants.

[20] In addition to the problems with the injunction outlined above, the injunction's command that the defendants not "permit" certain activity is too vague to satisfy the requirements of Fed. R. Civ. P. 65(d). See American Red Cross v. Palm Beach Blood Bank, Inc., 143 F.3d 1407, 1411 (11th Cir. 1998); Hughey v. JMS Dev. Corp., 78 F.3d 1523, 1531 (11th Cir. 1996). What exactly does it mean, for instance, for a principal to "permit" a prayer at a school's graduation? Does it mean merely that if he is aware

Chandler is present at the graduation, and, after hearing the prayer, obtains a show cause hearing from the district court.[21] At the hearing, the court holds the principal in contempt. In this situation, the harm sought to be prevented by the injunction – namely, the violation of Chandler's Establishment Clause rights[22] – would already have occurred, and the court could do no more than punish the principal for his contempt or attempt to compensate Chandler for the harm caused. The only form of coercive relief imaginable under the circumstances would consist of fining or imprisoning the principal until such time as the district court was convinced (presumably on the basis of nothing other than the principal's sincere-sounding promises) that he

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that a student speaker is going to pray, then he must ask the student not to do so? Must he prevent the student from speaking altogether once he is aware that the student is inclined to pray? If a student speaker surprises the principal with a prayer at graduation, must he, at once, rush on stage and attempt physically to remove the student from the microphone? This vagueness makes it impossible for the defendants to know exactly what the injunction requires of them.

[21] The only plaintiffs in the case against the DeKalb County Board of Education are Michael Chandler and his son Jesse, a seventh-grade student in the DeKalb County school system. Michael Chandler appeared as "next friend" for his son.

[22] I seriously doubt, in light of the majority's analysis, that a principal who permits a prayer, without more, has violated a student's Establishment Clause rights. For purposes of my analysis, however, I will assume the correctness of the district court's conclusion to the contrary.

would not repeat the offense; even then, the coercive sanctions would not have provided Chandler with any relief because the harm would still be fully accomplished. Cf. Gompers, 221 U.S. at 442, 31 S. Ct. at 498. Thus, only punitive or compensatory sanctions would be available.

Insofar as the injunction would be enforced via punitive contempt sanctions, it would provide no direct relief to Chandler. The only benefit it would bring to Chandler would be a deterrent to the principal, one which would be equally available in an action for damages under 42 U.S.C. § 1983 (1994). Thus, the injunction, if enforced by punitive contempt sanctions, gives Chandler no better relief than that which he could obtain at law.

Furthermore, enforcing the injunction with punitive contempt sanctions would raise a separation-of-powers problem. A necessary prerequisite for the issuance of the injunction was the district court's conclusion that the behavior to be enjoined – for instance, permitting a prayer at graduation – would constitute a violation of Chandler's constitutional rights. Therefore, punitive sanctions in response to a violation of the injunction would in essence be punishment for violating Chandler's constitutional rights. The legislature, however, has already prescribed the appropriate criminal punishments for violations of constitutional rights in 18 U.S.C. § 242 (1994), which states that whoever, under color of law, "willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of

the United States . . . , shall be fined under this title or imprisoned not more than one year, or both."[23] The enforcement of this provision is the job of the executive branch, meaning that Congress has determined that the United States Attorney, not the judiciary, is to determine whether the principal should be prosecuted. In such a prosecution, the full panoply of constitutional protections would apply, rather than the limited set that has been held to apply to the imposition of criminal contempt sanctions. See supra note 4. Furthermore, in a criminal prosecution, the principal could raise the defense, based on the "fair warning" requirement of the Due Process Clause, that section 242 does not clearly prohibit "permitting" a prayer at graduation. See United States v. Lanier, 520 U.S. 259, 267, 117 S. Ct. 1219, 1225, 137 L. Ed. 2d 432 (1997) (discussing, in the context of a section 242 prosecution, the constitutional requirement that the statute under which the defendant is prosecuted must have "made it reasonably clear at the relevant time that the defendant's conduct was criminal"). Such a defense would be unlikely to be available in a contempt hearing, because the injunction – unlike the statute – explicitly prohibits this behavior. In sum, criminal sanctions based on this

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[23] Conspiracies to violate this provision are outlawed by 18 U.S.C. § 241 (1994), which authorizes fines and imprisonment of up to ten years. Thus, if the United States Attorney could demonstrate that the principal conspired with, for instance, one or more members of the DeKalb County Board of Education to permit the prayer, it could obtain convictions under section 241 in addition to section 242.

injunction would constitute interference with the role of both the legislative and executive branches.[24]

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[24] Congress has responded to this problem to some degree in 18 U.S.C. § 402 (1994), titled, "Contempts constituting crimes." Under that section, where conduct constituting contempt of a district court order also constitutes a crime under federal or state law, the alleged contemnor is entitled to a trial by jury. Furthermore, the contemnor cannot be sentenced to more than six months imprisonment and cannot be assessed a punitive fine of more than $1,000.

One could contend that this statute implicitly authorizes the sort of "end run" around criminal procedure that I am attacking, and thus eliminates any separation-of-powers problem. After all, why would Congress pass a law prescribing procedures and penalties for contempts constituting crimes if it did not consider injunctions necessarily leading to such contempts (if disobeyed) to be acceptable?

A look at the legislative history of section 402 dispels this contention. Section 402 was passed in 1914 to prevent the abuse of labor injunctions. Congress was concerned that corporations were obtaining injunctions forbidding certain union activity; these injunctions were then enforced through summary contempt proceedings. (The constitutional protections that are now available in criminal contempt proceedings, see supra note 4, were not available at that time.) The result was the imposition of penalties for violations of the criminal law, but without the benefit of a jury trial. Section 402 was intended to minimize this problem. See United States v. Pyle, 518 F. Supp. 139, 152 (E.D. Pa. 1981) (discussing legislative history); 48 Cong. Rec. 8778 (1912) ("The courts have, under the guise of contempt of court, had men arrested and tried for crimes without the intervention of a jury." (statement of Rep. Clayton)).

In light of this legislative history, it is difficult to read section 402 as Congress' stamp of approval on injunctions enforceable only through

Insofar as this injunction would be enforced via compensatory contempt sanctions, it would merely be imitating the relief available to Chandler under 42 U.S.C. § 1983. Again, as with punitive sanctions, the injunction would give Chandler no relief different from that which he could obtain at law.[25]

It would, however, provide that relief in a manner

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punitive (or compensatory) sanctions. On the contrary, section 402 arises out of disapproval of such injunctions. See id. at 8779 ("This bill is to prevent a man or, say, a corporation, rich and powerful, getting out a blanket injunction at midnight, broad as the canopy of heaven in its terms, and then oppressing the poor, humble laborer." (statement of Rep. Clayton)). The fact that Congress chose to address the problem by limiting the damage at the back end (when contempt sanctions are imposed) in no way implies approval of the practice at the front end (when the injunction is issued). Cf. id. at 8798 (quoting statement of Rep. Sabath that the bill is not as broad as it should be, but is a step in the right direction).

Furthermore, had Congress intended so radical a move as to abolish completely the longstanding equitable principle that equity will not enjoin a crime, see supra note 14, it surely would have said something to indicate such an intent. Cf. Hecht Co. v. Bowles, 321 U.S. 321, 329, 64 S. Ct. 587, 591, 88 L. Ed. 754 (1944) ("We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made."). Nothing in the legislative history suggests that this is the case.

[25] The fact that exhaustion of state remedies is not required in section 1983 actions does not alter the requirement that a plaintiff seeking injunctive relief on the basis of section 1983 must demonstrate the absence of an adequate remedy at law. See Wallace v. Kern, 520 F.2d 400, 407 n.13 (2d Cir. 1975).

contrary to that which Congress contemplated in enacting section 1983, again creating a separation-of-powers problem.[26] For instance, in a section 1983 proceeding, the principal would be entitled to a trial by jury; this right is not guaranteed in a civil contempt proceeding. Furthermore, in an ordinary section 1983 suit, the principal could respond to the complaint with a motion to dismiss for failure to state a claim. If that failed, the principal could assert a defense of qualified immunity, on the ground that liability for "permitting" a prayer at graduation is not clearly established by Supreme Court or Eleventh Circuit precedent.[27]

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[26] This problem might not arise if the alleged violation of Establishment Clause rights was caused by a federal, rather than a state, official. Under those circumstances, the congressionally-created remedial scheme of section 1983 would be inapplicable, and a judicially-created remedial scheme based on Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), in which a cause of action is implied from the Constitution, would apply. (The adequate-remedy-at-law problem would of course remain.) In this case, however, Congress has created a remedial scheme for the constitutional violation (section 1983) and therefore, in the absence of a showing that the congressional scheme is inadequate, the courts are to defer to Congress. See McCarthy v. Madigan, 503 U.S. 140, 151, 112 S. Ct. 1081, 1090, 117 L. Ed. 2d 291 (1992).

[27] "[T]he qualified immunity test is simply the adaptation of the fair warning standard [from criminal law] to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes." Lanier, 520 U.S. at 270-71, 117 S. Ct. 1227.

Neither of these responses is generally available in a civil contempt proceeding. Thus, unless the show cause hearing were in effect transformed into a new section 1983 suit – with a jury trial, the opportunity to raise defenses, and so forth – the court would be violating the doctrine of separation of powers.

The second set of provisions challenged by the appellants, unlike the first set, was perfectly appropriate for inclusion in an injunction. Those provisions relate to the district court's command that the defendants (in conjunction with the plaintiffs) nominate three individuals, one of whom would serve as a monitor for the purpose of ensuring compliance with the injunction. This is a discrete act that, if not taken, could be compelled through coercive contempt sanctions (for instance, a fine of $100 for each day after the deadline that the list of individuals was not submitted). It was therefore properly the subject of an injunction.[28]

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[28] The unchallenged portions of the injunction are a mix of proper and improper provisions. For instance, in addition to enjoining the defendants from "permitting" certain religious activities, it also enjoins them from "aiding, abetting, commanding, counseling, inducing, ordering, procuring, or otherwise participating in" those activities. Regardless of which gerund is chosen, these injunctive provisions still forbid the performance of an act, and are therefore inappropriate. Other provisions, however, enjoin the defendants to promulgate a written policy relating to religious activity in schools, to provide the Gideons with a copy of the injunction, and to conduct a training session to instruct faculty and administrators regarding the Establishment Clause and the Free Exercise Clause. These provisions command the performance of specific acts, and are thus, at least in form,

In conclusion, the first set of injunctive provisions challenged by the appellants are enforceable only through punitive or compensatory contempt sanctions. They consequently raise all of the problems discussed in part I, and therefore must be vacated. The second set of provisions, however, raise none of those problems, and, for the reasons stated in the majority opinion, should be affirmed.

III.

The injunction is an important remedial tool, but also one that has been greatly abused. By using an injunction as an alternative means of creating criminal and/or civil liability, courts ignore fundamental equitable and constitutional principles. Certain injunctive provisions at issue in this appeal illustrate this problem. I therefore concur in the majority opinion.

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perfectly legitimate.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MICHAEL CHANDLER, *et al.*,

Plaintiffs,

v. **CIVIL ACTION NO. 96-D-169-N**

FORREST H."FOB" JAMES JR., et al.,

Defendants.

ORDER

Before the court is a "Motion For Partial Stay Of Permanent Injunction" ("Defs.' Mot.") filed on November 10, 1997 by the Attorney General of the State of Alabama, the Alabama State Board of Education and its individual members, and the DeKalb County, Alabama, Board of Education and its individual members ("Defendants"). Defendants filed a "Memorandum In Support" ("Defs.' Mem. In Supp.") on the same date. Plaintiffs filed their "Opposition To 'Defendants' Motion To Stay' " ("Pls.' Opp'n") on November 18, 1997 to

which Defendants filed a Reply ("Defs.' Reply") on November 24, 1997. On the same date, Plaintiffs filed their "Supplemental Opposition To 'Defendants' Motion To Stay' " ("Pls.' Supplemental Opp'n"), and the "Declaration Of Susan Jane Neely In Opposition To 'Defendants' Motion To Stay' Injunction" ("Neely Decl."). On December 5, 1997, Plaintiffs filed their "Reply To '[Defendants'] Reply to Plaintiffs' Opposition To Defendants' Motion For Partial Stay,' " ("Pls.' Reply"), and the Declaration of John Woodfin ("Woodfin Decl.").[1] On December 4, 1997, counsel for the DeKalb County Board of Education and its Superintendent, filed a "Report to Court of Counsel of DeKalb County Board of Education, et al." ("DeKalb Sch. Bd. Report To Ct.") On December 15, 1997, Plaintiffs filed their "Additional Evidence In Opposition To Defendants' Motion For Stay." ("Pls.' Add. Evid.").

Defendants move the court, pursuant to Rule 62 of the Federal Rules of Civil Procedure, for a stay of sections 6(a), 6(b), 6(c), 6(d), 6(e) and 7 of the court's October 29, 1997 Permanent Injunction ("Permanent Inj."), pending review by the Eleventh Circuit Court of Appeals. (Defs.' Mot. at 1.) Defendants contend that these sections of the Permanent Injunction are "vague and overbroad." (Defs.' Mem. In Supp. at 1.) Plaintiffs argue that the "proscriptions are all specific and

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[1] Woodfin's Declaration was originally filed in handwritten form as Exhibit B to Plaintiffs' Supplemental Opposition filed November 24, 1997. The December 5, 1997 filing was typed and formally executed.

under the totality of the circumstances give ... an extremely clear understanding of the conduct that is proscribed." (Pls.' Opp'n at 7.) After careful consideration of the arguments of counsel, as well as relevant law, the court finds that Defendants' "Motion For Partial Stay Of Permanent Injunction" is due to be granted as to twelve words of the court's three-thousand, seven-hundred and fourteen word Permanent Injunction, and otherwise denied.

DISCUSSION

On March 12, 1997, the court issued a Memorandum Opinion and Order finding unconstitutional Alabama Code Section 16-1-20.3, Alabama's fourth incantation of a "school prayer" statute. *Chandler v. James*, 958 F. Supp. 1550, 1568 (M.D. Ala. 1997). The challenge to the statute arose in the context of officially initiated, promoted and/or sanctioned religious activity that was occurring in the public schools of DeKalb County, Alabama. On October 29, 1997, the court issued a Permanent Injunction enjoining various state and local officials from enforcing Alabama Code Section 16-1-20.3. (*See* Permanent Inj. at 1-3.) The Permanent Injunction also prohibited a variety of officially initiated, promoted and/or sanctioned activities that the court found to be in violation of the First Amendment.[2] (*Id.* at 3-12.) Provisions were made to ensure compliance and to protect the rights of those citizens who were subject to the activity found unconstitutional. (*Id.* at

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[2] In addition to the March 1997 Memorandum Opinion and Order, the court's findings were articulated in its November 1997 Supplemental Opinion and Order and November 1997 Memorandum Opinion and Order.

3-16.) In the Motion To Stay currently before the court, Defendants do not challenge those portions of the Permanent Injunction prohibiting enforcement of Alabama Code Section 16-1-20.3; their challenge is limited to specific sections of the Permanent Injunction applicable to DeKalb County, Alabama.[3]

For purposes of clarity, and in order to rectify convoluted interpretations of the terms of the court's Permanent Injunction, the court will: (1) state the applicable law; (2) restate the specific provisions of the Permanent Injunction that are at issue; (3) summarize the arguments of counsel; and (4) analyze the arguments of counsel in light of applicable law and the terms of the Permanent Injunction.

I. APPLICABLE LAW

A. Standard Of Review

Rule 62(c) of the Federal Rules of Civil Procedure provides that "the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party." *Fed. R. Civ. P.* 62(c). In *Hilton v. Braunskill,* 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987), the Supreme Court stated that:

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[3] The Defendants, speaking through the Attorney General, stated that they are "not challenging this Court's March 12, 1997 Memorandum Opinion, the factual record in this matter, or thirty years of controlling legal precedent.... For purposes of Defendants' Motion For Partial Stay, the Attorney General is only challenging certain provisions of this Court's October 29, 1997 Permanent Injunction." (Defs.' Reply at 2.)

> Different Rules of Procedure govern the power of district courts and courts of appeal to stay an order pending appeal. *See* Fed. Rule Civ. Proc. [sic] 62(c); Fed. Rule App. Proc. [sic] 8(a). Under both Rules, however, the factors regulating the issuance of a stay are generally the same: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton, 107 S. Ct. at 2119 (citations omitted).[4] These factors "contemplate individualized judgment in each case, [and] the formula cannot be reduced to a set of rigid rules." *Id.*

Defendants urge the court to also consider their Motion under what they describe as the "alternate standard" outlined by the Eleventh Circuit in *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir.1986). (Defs.' Mem. In Supp. at 3.) There, the Eleventh Circuit, as quoted by the Defendants, stated that "[o]rdinarily the first factor is the most important ... [b]ut the movant may also have his motion granted upon a lesser showing of a substantial case on the merits when the balance of equities [identified in factors 2, 3, and 4] weighs heavily in favor of

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[4] The parties agree that these factors guide the court's analysis in assessing a request for a stay. (*See* Defs.' Mem. In Supp. at 3; Pls.' Opp'n at 5-6.)

granting the stay." (Defs.' Mem. In Supp. at 3 (citing *Garcia-Mir*, 781 F.2d at 1453).) Defendants argue that they are "not only likely to prevail on appeal, but the last three factors weigh heavily in favor of granting the stay. Therefore, the movants are entitled to prevail under the Eleventh Circuit's alternate standard." (*Id.*)

As an initial matter, the court notes that in *Garcia-Mir*, the Eleventh Circuit addressed an "emergency motion to stay" filed in the court of appeals, rather than in the district court in which the action originated. *Garcia-Mir*, 781 F.2d at 1451, 1453; *see also, United States v. Bogle*, 855 F.2d 707 (11th Cir.1988) (applying factors articulated in *Garcia-Mir* in context of emergency appeal before the Eleventh Circuit and citing to Eleventh Circuit Rule 27-1(b)).[5] The Eleventh Circuit

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[5] Eleventh Circuit Rule 27-1(b) provides:

> (b) Emergency Motions.
>
> (1) A party requesting emergency action shall label the motion as "Emergency Motion" and state the nature of the emergency and the date by which action is necessary. The motion or accompanying memorandum shall state the reasons for granting the requested relief and must specifically discuss: (i) the likelihood the moving party will prevail on the merits; (ii) the prospect of irreparable injury to the moving party if relief is withheld; (iii) the possibility of harm to other parties if relief is granted; and (iv) the public interest. Counsel filing the motion shall make every possible effort to serve the motion personally; if this is not possible, counsel shall notify

specifically noted the "emergency" nature of the motion to stay at issue there, and noted the "extraordinarily high standards of review of motions for emergency stays." *Id.* at 1451, 1454. In contrast, the Motion To Stay at issue in this action was filed with *this* court, a United States District Court, not the Eleventh Circuit Court of Appeals, and is in a non-emergency posture.

Utilization of the four *Hilton* factors in an "emergency" context ordinarily entails analysis of substantially more compelling factual and legal circumstances than in ordinary motions to stay. Predictably, that is why provisions are made for "emergency" motions, and why the factors may be entitled to different weight in that context. In an "emergency" appellate

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opposing counsel promptly by telephone.

(2) If the emergency motion raises any issue theretofore raised in a district court, counsel for the moving party shall furnish copies of all pleadings, briefs, memoranda or other papers filed in the district court supporting or opposing the position taken by the moving party in the motion and copies of any order or memorandum decision of the district court relating thereto. If compliance is impossible or impractical due to time restraints or otherwise, the reason for non-compliance shall be stated.

(3) An emergency motion, whether addressed to the court or an individual judge, ordinarily should be filed with the clerk and not with an individual judge. To expedite consideration by the court in a genuine emergency, counsel may telephone the clerk and describe a motion that has not yet been filed in writing. This is not a substitute for the filing required by FRAP 27(a).

proceeding, emphasis may be placed on the likelihood of success on the merits, in part because the appellate court must determine that the trial court below was "clearly erroneous." *Garcia-Mir*, 781 F.2d at 1453. Once this determination is made, the likelihood of reversal on appeal may justify granting a stay, regardless of the other three factors. That is also why a showing of a "substantial case on the merits" coupled with the other three factors weighing heavily in favor of the movant may justify a stay. *See Garcia-Mir*, 781 F.2d at 1453. Hence, emphasis on the first factor, in those contexts, is warranted.

Tellingly, in *Hilton*, the Supreme Court was not addressing the standards utilized in "emergency" appellate proceedings, or "emergency" district court proceedings for that matter, and made no mention of applying heightened deference to the first *Hilton* factor in district court proceedings. *Hilton*, 481 U.S. at 776-77. The Court was careful to note, however, that "individualized judgments" must be made in each case, and that "the formula cannot be reduced to a set of rigid rules." *Id.* at 776.

Not only do Defendants conveniently fail to note the emergency, appellate, posture of *Garcia-Mir*, as opposed to the non-emergency posture of the Motion To Stay currently in this court, they also fail to cite the entirety of the Eleventh Circuit's relevant language in *Garcia-Mir* (the language quoted by Defendants is italicized):

> We must always be diffident in interposing the power of an appellate court into the province of the trial court

> and its orders save upon full briefing and mature reflection by this Court. The grant of an emergency motion to stay the trial court's mandate is thus an exceptional response granted only upon a showing of four factors: 1) that the movant is likely to prevail on the merits on appeal; 2) that absent a stay the movant will suffer irreparable damage; 3) that the adverse party will suffer no substantial harm from the issuance of the stay; and 4) that the public interest will be served by issuing the stay. *Ordinarily the first factor is the most important.* A finding that the movant demonstrates a probable likelihood of success on the merits on appeal requires that we determine that the trial court below was clearly erroneous. But the movant may also have his motion granted upon a lesser showing of a "substantial case on the merits" when the balance of the equities [identified in factors 2, 3, and 4] weighs heavily in favor of granting the stay.

Garcia-Mir, 781 F.2d at 1453 (citations omitted). The emphasis placed on the first factor was clearly done in the context of an "emergency" appellate review of a district court order. Use of the *Garcia-Mir* standard by a district court would essentially require the court to determine that it was clearly erroneous in issuing a staying of its order(s). Such analysis would be more appropriate in determining a Rule 59 motion to alter or amend or a Rule 60 motion for relief from a judgment or order--not a motion to stay pending appeal.

Regardless of whether the court applies the *Hilton* factors without emphasis on one over the other, or whether the court applies the *Garcia-Mir* heightened emphasis on the first factor standard, an "individualized judgment" under either leads the court to the conclusion that Defendants' Motion To Stay is due to be granted as to twelve words of the court's three-thousand, seven-hundred and fourteen word Permanent Injunction, and otherwise denied. *See Hilton*, 481 U.S. at 776.

The first *Hilton* factor entails analysis of whether the applicant for the stay has made a "strong showing that he is likely to succeed on the merits," *id.*, while under *Garcia-Mir*, a stay may be warranted if the movant shows the "probable likelihood" of success on the merits. *Garcia-Mir*, 781 F.2d at 1453. This would require a determination that the trial court was "clearly erroneous." *Id. Garcia-Mir* also allows for the granting of a motion to stay upon a "lesser showing of a 'substantial case on the merits' when the balance of the equities [identified in factors 2, 3, and 4] weighs heavily in favor of granting the stay." *Garcia-Mir*, 781 F.2d at 1453. This "lesser showing" is thus nothing more than a conjunctive application of the *Hilton* factors without emphasis on one over the others. A stay is warranted if the movant satisfies *all four* of the elements articulated in *Hilton*. Indeed, the *Garcia-Mir* court noted that even if the movant's likelihood of success on the merits is "substantial," that alone will not support a stay "when the other three factors we must consider point so strongly in the other direction." *Id.* at 1455.

The court's Permanent Injunction was issued after much forethought and deliberation, based on its March 1997 Memorandum Opinion And Order and on its findings based on its review of the record as articulated more fully in its November 1997 Memorandum Opinion And Order and November 1997 Supplemental Opinion And Order. Upon issuance of its Permanent Injunction, the court did not consider the provisions at issue here to be clearly erroneous then, and it declines to so find now. Nor does the court consider the majority of the Attorney General's objections, arguing that the Permanent Injunction tramples free expression in its proscription of state established religion, to be well founded.

The court finds that Defendants have neither shown that they are likely to prevail on the merits nor that they have a substantial case on the merits. Apparently the court's forty page March 1997 Memorandum Opinion And Order, the court's seventeen page October 1997 Permanent Injunction, the court's twenty-four page November 1997 Memorandum Opinion And Order, and the court's sixty-two page November 1997 Supplemental Opinion and Order did not make the court's findings sufficiently clear or were ignored: the religiously coercive practices that were ongoing in DeKalb County, Alabama, violate the First Amendment to the United States Constitution as interpreted by the United States Supreme Court and the Eleventh Circuit Court of Appeals. These violations necessitated the court's Permanent Injunction.

The court is aware of the narrow scope of the Defendants'

Motion; Defendants merely contend that the provisions of the Permanent Injunction proscribing unconstitutional conduct are "vague" and "overbroad," and that they accordingly "hinder" free expression, not that the underlying actions enjoined are permissible.[6] Nevertheless, as the court has previously made clear, and as the court finds now, given the state of current First Amendment jurisprudence, as articulated by courts with direct authority over this court, as well as the legal standards applicable to the issuance of permanent injunctions, the Defendants have not made a "strong showing" or exhibited a "probable likelihood" of success on the merits. With the exception of a portion of section 6(a) discussed *infra*, the court finds that the Permanent Injunction meets its remedial purpose of proscribing unconstitutional conduct without unduly burdening free expression rights. *See, e.g., Lucero v. Trosch*, 121 F.3d 591 (11th Cir.1997) (citing *Schenck v. Pro-Choice Network*, 519 U.S. 357, 117 S. Ct. 855, 137 L. Ed. 2d 1 (1997), and *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994), and utilizing analysis of whether injunction provisions burden more speech than necessary to serve relevant government interests). Indeed, this court champions the free expression rights of the citizens of the State of Alabama and of the United States, exercised, of course, in concert with other First Amendment rights.

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[6] *See* note 3, *supra*.

The court finds the portions of Plaintiffs' Memorandum In Opposition regarding Defendants' likelihood of success on the merits on appeal to be clear, concise, eminently well written, and most importantly, a correct review of applicable law. Accordingly, the court adopts those portions of Plaintiffs' Memorandum In Opposition as herein articulated:

> The October 29 injunction should have come as no surprise to anyone at all familiar with Establishment Clause jurisprudence. Public school officials have long been prohibited by the Establishment Clause of the First Amendment to the United States Constitution from inserting religious exercises into school activities. *See, e.g., Lee v. Weisman,* 505 U.S. 577, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992) (prayer at graduation assemblies); *Edwards v. Aguillard,* 482 U.S. 578, 107 S. Ct. 2573, 96 L. Ed. 2d 510 (1987) (requirement to teach "creation science"); *Wallace v. Jaffree,* 472 U.S. 38, 105 S. Ct. 2479, 86 L. Ed. 2d 29 (1985) (daily prayer in public school classrooms); *Karen B. v. Treen,* 653 F.2d 897 (5th Cir.), *aff'd per curiam,* 455 U.S. 913, 102 S. Ct. 1267, 71 L. Ed. 2d 455 (1982) (classroom prayer by students or teachers); *Stone v. Graham,* 449 U.S. 39, 101 S. Ct. 192, 66 L. Ed. 2d 199 (1980) (posting copy of Ten Commandments on public school classroom walls); *Epperson v. Arkansas,* 393 U.S. 97, 89 S. Ct. 266, 21 L. Ed. 2d 228 (1968) (statute prohibiting the teaching of evolution);

Abington Schl. Dist. v. Schempp, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963) (Bible reading before class by student volunteers); *Engel v. Vitale*, 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962) (nonsectarian prayer at beginning of school day); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948) (religious instruction on school property during school day).

These unconstitutional school-sponsored activities are not transformed into constitutional activities by the involvement of willing students. *See Schempp*, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 44 (student-led devotional readings in the classroom); *ACLU v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471 (3d Cir.1996) (*en banc*) (student-initiated prayer at graduation); *Ingebretsen v. Jackson Public Schl. Dist.*, 88 F.3d 274 (5th Cir.), *cert. denied*, --- U.S. ----, 117 S. Ct. 388, 136 L. Ed. 2d 304 (1996)[7] (student initiated prayer at compulsory and noncompulsory

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[7] *Ingebretsen*, constrained by *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir.1992), held that "nonsectarian, nonproselytizing student-initiated prayers" at graduation ceremonies did not violate the Establishment Clause, while simultaneously holding that those same prayers at all other school-sponsored compulsory or noncompulsory activities did. The Fifth Circuit is the only Circuit to adopt the graduation ceremony exception to the Establishment Clause, and the Fifth Circuit's rule is directly defiant of *Lee v. Weisman*.

school sponsored events); *Jager v. Douglas County Bd. of Educ.*, 862 F.2d 824 (11th Cir.), *cert. denied*, 490 U.S. 1090, 109 S. Ct. 2431, 104 L. Ed. 2d 988 (1989) (student-led prayers and invocations at high school sporting events);[8] *Hall v. Board of Schl. Comm'rs of Conecuh County*, 656 F.2d 999 (5th Cir. Unit B 1981) (student-led morning devotionals over the school intercom); *Collins v. Chandler Unified Schl. Dist.*, 644 F.2d 759 (9th Cir.1981) (student-led prayer at school assemblies); *Karen B. v. Treen*, 653 F.2d 897 (5th Cir.1981), *aff'd per curiam*, 455 U.S. 913, 102 S. Ct. 1267, 71 L. Ed. 2d 455 (1982) (student-led prayers in the classroom).

The "free exercise" and "free speech" rights of students do not trump the Plaintiffs' rights to be free of Establishment Clause violations. The plaintiffs have argued this since the inception of this case, and the court so found in citing *Barnette*, *Schempp*, and *Jager*. None of this record supports the Attorney General in

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[8] Although one might think that any claim of success on appeal in the Eleventh Circuit would focus on the leading Eleventh Circuit case, *Jager v. Douglas County Board of Education*, 862 F.2d 824 (11th Cir.), *cert. denied*, 490 U.S. 1090, 109 S. Ct. 2431, 104 L. Ed. 2d 988 (1989), *Jager* is almost completely absent from the Attorney General's discussion, making only a brief parenthetical appearance on page 13 of the Motion for Partial Stay.

what the plaintiffs take to be a motion to stay premised on the allegation that the injunction amounts to viewpoint discrimination, and the pretense that it does is at odds with the record. [9]

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[9]This Court might well say, like the *Ingebretsen* court:

> The Attorney General's ... proffered secular purpose of prayer at student sporting events--prohibiting viewpoint discrimination--must be rejected out of hand. While the United States Supreme Court has recognized that prohibiting viewpoint discrimination may serve a secular purpose, *see Mergens*, 496 U.S. at 248, 110 S. Ct. at 2370, the Attorney General has not shown that any of the forums where student prayer is authorized under the statute are open forums and that religious groups have been denied access. The *Mergens* line of cases cited by the Attorney General involves situations where religious groups sought access to public school facilities and were denied for fear that access to these facilities by religious groups would violate the Establishment Clause.... We are not faced with such a situation here. Student assemblies, student sporting events, graduation or commencement, and other school-related activities ostensibly are not open forums in public schools. By granting prayer an exalted status over other types of speech in these forums, the state runs the grave risk of favoring one religion over another or favoring religion over irreligion. *See Board of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 114 S. Ct. 2481, 2491, 129 L. Ed. 2d 546 (1994).

Ingebretsen, 864 F. Supp. at 1490.

The record here shows no instance in which a religious group has

Relatedly, free speech rights are not absolute. Where "the degree of captivity makes it impractical for the unwilling viewer to avoid exposure," a speaker does not have the absolute right to say exactly what he wants. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975). While a speaker "clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it." *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307, 94 S. Ct. 2714, 41 L. Ed. 2d 770 (1974) (upholding a ban on political ads in rapid transit cars based upon the captive audience). *See also Frisby v. Schultz*, 487 U.S. 474, 487-88, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988) (allowing a city to limit picketing in front of homes so as to protect persons from unwanted speech while at home).

Students enjoy even less freedom to speak their minds while under the supervision of the public schools. In *Bethel School District v. Fraser*, 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986), cited by the Attorney General, the Court recognized that the free

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ever been denied anything in DeKalb County. Quite the opposite is true; the Gideons have been handed the classrooms. The plaintiffs repeat, as they have argued throughout this case, that violating the Establishment Clause is not a free speech or free exercise right.

speech rights of students are not co-extensive with the free speech rights of adults. *Id.* at 682. The *Fraser* Court also noted "the obvious concern on the part of parents and school authorities ... to protect children--*especially in a captive audience* --from exposure to" certain speech in school assemblies. *Id.*, 478 U.S. at 684 (emphasis added). *See* Mem. Op., Mar. 12, 1997 at 21 (*quoting Fraser.*)

Previously, in *Tinker v. Des Moines Independent School District,* 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969), the Court discussed the limitations on students' rights to speak freely: "[C]onduct by the student, in class or out of class, which for any reason--whether it stems from time, place or type of behavior--materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Id.* at 513. *See* Mem. Op., Mar. 12, 1997 at 20 (*quoting Tinker*). While the Supreme Court held that the *Tinker* student had a First Amendment right to engage [sic] in the activity at issue (the wearing of a black armband), it first held that this speech did not "impinge upon the rights of other students." 393 U.S. at 509.

The *Jager* court addressed the same concerns raised by the Defendants in this case, and concluded that student-initiated prayers, even at "noncompulsory"

events such as football games, violate the Establishment Clause.

In *Jager*, the defendant high school had a practice of permitting prayers and invocations immediately prior to the high school's home football games. *Jager*, 862 F.2d at 826. The prayers were explicitly Christian, "frequently invok[ing] the name of Jesus Christ," and were delivered by members of the local Protestant clergy. *Id.* at 826, 841 n. 2. Since at least 1947, these pregame prayers had been a part of the defendant's football season. *Id.* at 841 n. 2. In response to complaints about the old policy, the school developed a new policy:

> All school clubs and organizations can designate club members to give invocations and any student, parent, or school staff member can seek to deliver an invocation ... the student government will randomly select the invocation speaker and no ministers will be involved in selecting invocation speakers or in delivering invocations. In addition, the schools will not monitor the content of the invocations.

Jager, 862 F.2d at 827.[10] Despite these innovations, the *Jager* court still concluded that the policy was in violation of the Establishment Clause.

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[10] As noted earlier, this was not an official Douglas County School Board policy but rather, vested discretion in school principals.

Lee indicates how right the Eleventh Circuit was in *Jager*. The Supreme Court's holding in *Lee* is summarized in its last paragraph which, like the vast majority of the decision, makes no reference to the fact that the prayer was offered by clergy under some particular guidelines and does not take into account the identity of the speaker:

> **The sole question presented** is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform. No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment.

Id., 505 U.S. at 599 (emphasis added). In short, the sole *relevant* facts are the same here as in *Lee:* (1) prayer in a school program, and (2) a coerced plaintiff. (Pls.' Mem. In Opp'n at 32-38.) Based on the foregoing, the court finds that the first *Hilton* factor cuts against the Defendants.[11]

In addition, the other three *Hilton* factors strongly favor Plaintiffs' position. The second and third factors

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[11] The court addresses the hypotheticals proffered by the Attorney General in support of his "likelihood of success on the merits" argument, *infra*.

> essentially require the court to weigh the harm that Defendants may incur absent a stay against the harm that Plaintiffs may incur should a stay be granted. Defendants argue that "the movants and other citizens of Alabama are likely to suffer irreparable harm if this Motion is not granted." (Defs.' Mot. at 2.) Closely associated with the court's analysis of the second and third factors are Defendants' contentions regarding the fourth factor: "whether the granting of the stay would serve the public interest." Defendants argue that "the public interest would be served by granting [a stay] in order that the status quo may be preserved pending appeal." (Defs.' Mot. at 2.) Essentially, the Attorney General argues that because he reads the injunction as unduly limiting free expression rights, the better path would be to preserve the status quo pending appeal. Plaintiffs counter that "the *status quo* has been an illegal state of affairs in DeKalb County, Alabama."
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> (Pls.' Opp'n at 6 (emphasis in original).)

As noted, the court finds that Defendants have not shown a likelihood of success on the merits; specifically, that the court's Permanent Injunction does not unduly burden free expression rights in its preservation of individual liberties and proscription of state established religion. Additionally, throughout its previous Orders, the court has expressed its findings that public policy favors Plaintiffs in this action. The status quo, which the Attorney General urges this court to continue, includes, but is

not limited to, state sponsored and officially sanctioned religious activity in the DeKalb County schools. Indeed, the Attorney General is not challenging the factual record or thirty years of controlling precedent. (Defs.' Reply at 2.) Nevertheless, by tying arguments urging preservation of the status quo because of what the Attorney General perceives to be an undue burden on free expression rights with analysis under *Hilton* 's harm to the Defendants and public interest factors, the Attorney General essentially argues for preservation of majoritarian will. As the Attorney General should know, however, the will of the majority makes for sound argument in election disputes and political grandstanding; not in the analysis of First Amendment jurisprudence prohibiting officially sanctioned religious activities that violate the First Amendment.

At a minimum, the status quo in DeKalb County violates the First Amendment's dictate that states "pursue a course of complete neutrality toward religion." *Jager v. Douglas County School Dist.*, 862 F.2d 824, 828 (11th Cir.1989) (citing *Wallace v. Jaffree*, 472 U.S. 38, 60, 105 S. Ct. 2479, 86 L. Ed. 2d 29 (1985)).[12] Further, the status quo violates the interests of those counter-majoritarian citizens who choose to exercise religious beliefs, or who choose to not exercise religious beliefs, by forcing upon them, in an official setting, religious beliefs and practices that they may find unwelcome and that smack of state

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[12] The Attorney General appears to recognize this established principle of First Amendment jurisprudence. (*See* Defs.' Mem. In Supp. at 21-22 n. 6.)

indorsement. The exercise of free expression rights do not justify violations of the Establishment Clause. *See, e.g., Bethel School District v. Fraser,* 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986); *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed.2d 125 (1975); *Lehman v. City of Shaker Heights,* 418 U.S. 298, 94 S. Ct. 2714, 41 L. Ed. 2d 770 (1974); *Tinker v. Des Moines Indep. Sch. Dist.,* 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed.2d 731 (1969). Consequently, the court finds no merit in Defendants' argument that execution of the Permanent Injunction will result in the harm anticipated by the Defendants.

In addition, the court finds that absent execution of the Permanent Injunction, Plaintiffs will most surely suffer those harms that the Permanent Injunction specifically endeavors to prevent. Defendants will continue to violate Plaintiffs' rights, as evidenced by their unwillingness to comply with the court's Permanent Injunction, or, for that matter, with Supreme Court and Eleventh Circuit precedent detailing proscribed activity. Despite Defendants': (1) admission that they are "not challenging the court's March 12, 1997 Memorandum Opinion, the factual record in this matter, or thirty years of controlling precedent," (Defs.' Reply at 2); (2) admission that "educators within Alabama's public schools [do not] have the right to subject students to unwanted religious indoctrination," (Defs.' Reply at 7); and (3) recognition of the clear holding of the Eleventh Circuit in *Jager,* where, in the Attorney General's own words, "the court struck down a school district practice of

authorizing and organizing invocations to be given prior to public high school football games," (Defs.' Reply at 9 (citing *Jager*, 862 F.2d 824 (11th Cir.1989)), Defendants' *actions* indicate the contrary.

Two Declarations filed by the Plaintiffs on November 24, 1997,[13] to which the Defendants have notably failed to respond, allege that the following occurred at a November 7, 1997 Sylvania High School football game:[14]

> 1. At about 7:00 p.m., a voice came over the P.A. The voice said there was someone there who had a special message for us. A second voice told us that a recent ruling had banned prayer in school. He said that they wanted us to help them send a message to the federal government and the rest of the country. This voice also said that he had the full support of Fob James, the Governor of Alabama.
>
> 2. All of the students were asked to go down to the football field, join hands, and form a circle. The stands

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[13]The Declaration of Susan Jane Neely was filed November 24, 1997. On the same date, Plaintiffs filed their "Supplemental Opposition To 'Defendants' Motion to Stay,' " which contained the hand-written statement of John Woodfin. Woodfin's typed and executed Declaration was filed December 5, 1997.

[14] Sylvania High School is one of the public schools located in DeKalb County, Alabama. The court's Permanent Injunction was issued October 29, 1997; the described activities occurred subsequent to, and in specific defiance of, the injunction.

> cleared, as children from probably kindergarten up to twelfth grade made their way to the field. The circle stretched the width and length of the field, and consisted of students, band members, and cheerleaders. Then a man, middle-aged, wearing glasses, and on crutches because he only had one leg, walked to the middle of the circle. He told all of the children to get down on their knees and raise their hands to heaven. He told them to raise their hands up high because there might be someone there who needed to see this. Next, he said that they were going to pray to their god. There was a brief moment of silence, and then the man led these students in prayer, the Lord's Prayer.

(*See* Neely Decl. ¶ ¶ 1, 2; *see also* Woodfin Decl. (describing same activity).) In addition, Gary Carlyle, Principal of Sylvania High School, wrote letters to both the Montgomery Advertiser and the Birmingham News that, at best, evidence misunderstanding of the terms of the Permanent Injunction, and at worse, when read in conjunction with the activities described in the Neely and Woodfin Declarations, evidence deliberate defiance. (*See* Pls.' Supplemental Opp'n, Exs. A, A-1.)

Moreover, on November 4, 1997, the Governor of Alabama--a Party to this action--issued a Statement regarding the court's Permanent Injunction. In this Statement, the Governor asserted that the children of the nation's founders "had the benefit of prayer in school," and after reiterating his desire that this court decline to follow United States Supreme Court

precedent and instead follow the Governor's interpretation of the United States Constitution, stated: "I will resist Judge DeMent's order by every legal and *political* means with every ounce of strength I possess."[15] (*See* Pls.' November 6, 1997 Mot. To Enjoin Proceedings in the Etowah County Circuit Ct., Ex. B (emphasis added).)

Based on these explicit and implicit indicia of noncompliance and purported and actual defiance of the law, as well as the myriad media reports that have been called to the court's attention, of which the court takes judicial notice, but on which the court does not rest its findings, it is clear that DeKalb County has allowed prayer at a high school football game in contravention of *Jager* and in specific defiance of the Permanent Injunction, and that the state chief-executive has promised

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[15]For an extensive overview of the Governor's unique interpretation of the United States Constitution and his misguided opinion as to why lower federal courts are not bound by Supreme Court precedent, see the thirty-four page June 1997 letter from Governor James to the court. In addition to the record, the text of the letter may be viewed, as of December 15, 1997, via the Internet at <http://alaweb.asc.edu/govoff.html>. *See also* Fob James, Jr., *DeMent Followed High Court Deceit,* Birmingham News, December 7, 1997, at 1C.

It is indeed ironic, as Plaintiffs note, that Governor James "simultaneously contend[s] that the Court has no jurisdiction over the first amendment and then support[s] a stay of the Court's injunction on the ground that it infringes on students' first amendment rights...." (Pls.' Reply at 21-22.)

political defiance.[16] It is clear that absent the Permanent Injunction remaining in effect, constitutional violations will continue, as indeed they *have* continued. Consequently, Plaintiffs have and will continue to suffer significant harms.

Contrary to majoritarian wishes, the State of Alabama cannot establish an official religion, either explicitly or implicitly, and officially-sanctioned religious activity in public schools can and must be prohibited to protect the rights of *all* of the citizens of Alabama.[17] On balance, the court finds it more likely that Plaintiffs, and other citizens, will be substantially injured by a

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[16] The court has no qualms regarding the Governor's promise of *legal* resistance to the court's Orders, and indeed encourages the pursuance of an appeal. Such is the proper procedure for addressing and resolving purported discrepancies in court orders.

[17] The court suspects that if the Permanent Injunction enjoined non-majoritarian religious, or for that matter atheist or agnostic, beliefs and practices from being forced on school-children in DeKalb County, certain state officials would be first in line to seek enforcement of the court's Permanent Injunction. Such religious prejudice is one of the reasons our forefathers left England for America, and one of the reasons the First Amendment prohibits state-established religion. (*See* November 1997 Supplemental Op. and Order at 60-61 n. 54); *see also Engel*, 370 U.S. at 432. "The right to be free from state-established religion lies at the heart of the concept of 'freedom of religion' embodied in the First Amendment." (November 1997 Supplemental Op. and Order at 61 n. 54 (citing *Lee*, 505 U.S. at 591).) "The individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority." *Wallace*, 472 U.S. at 60.

stay of the Permanent Injunction than that Defendants will suffer irreparable harm as a result of the enforcement of the Permanent Injunction. Accordingly, the court finds that *Hilton* 's second and third factors cut against the Defendants and that *Hilton* 's public interest factor favors denial of the Motion To Stay, as well.

B. Interpretation Of The Permanent Injunction

The Defendants contend that the provisions of the Permanent Injunction at issue are "*facially* unconstitutional," (Defs.' Reply at 2 (emphasis in original)), and that "facial challenges to government enactments must be decided by reference to the contents of the restrictive language in question." (Defs.' Reply at 5.) Under the Attorney General's analysis, the court must look only to the language of the Permanent Injunction itself (on its face) in determining whether it passes constitutional muster or whether the provisions are vague and overbroad, as Defendants contend. (*See generally* Defs.' Reply at 2-6.) When so read, Defendants argue, "[t]hese provisions ... are *facially* unconstitutional, without regard to this Court's previous Orders or the factual basis from which this case arose." (Defs.' Reply at 2 (emphasis in original).)[18]

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[18]Interestingly, the Attorney General also states that he "does not dispute Plaintiffs' contentions that the Permanent Injunction should be read in light of this Court's previous rulings." (Defs.' Reply at 3.) The Attorney General then takes the position that "the Permanent Injunction is *inconsistent* with this Court's previous rulings and controlling Supreme Court precedent. For these reasons, Defendants believe that this Court must stay those provisions

Plaintiffs counter that the Defendants not only ignore the plain language of the Permanent Injunction, (Pls.' Opp'n at 10), but that the correct " 'inquiry should be whether the parties subject to the injunction understood their obligations under the order.' " (Pls.' Opp'n at 6 (quoting *Combs v. Ryan's Coal Co.*, 785 F.2d 970, 978-79 (11th Cir. 1986), *cert. denied*, 479 U.S. 853, 107 S. Ct. 187, 93 L. Ed. 2d 120 (1986)).) Plaintiffs urge a reading of the Permanent Injunction in context, and contend that when so read, the "proscriptions are all specific and under the totality of the circumstances give DeKalb County an extremely clear understanding of the conduct that is proscribed." (Pls.' Opp'n at 7.)

In contrast to Defendants' argument that only the face of the Permanent Injunction should be read in construing its terms, the Eleventh Circuit noted in *Combs* that:

> A court may also disregard [a] defect [in an injunction] *if it is clear from the totality of the language in the various documents that [those enjoined] understood their obligations under the injunction. United States v. Goehring*, 742 F.2d 1323, 1324 (11th Cir.1984) (*per curiam*) (Rule 65(d) not specifically invoked, but

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of the Permanent Injunction which were specified in Defendants [sic] Motion for Partial Stay." (*Id.*) Although not clear, the Attorney General appears to be arguing that the challenged provisions of the Permanent Injunction are unconstitutional on their face, *or*, when read in conjunction with the court's previous Orders, are inconsistent with those Orders, and thus unconstitutional.

> contempt order upheld that incorporated earlier order because later order "contains sufficient findings of fact and conclusions of law for this court to perform its proper function and for the appellant to clearly understand the basis for the contempt order.")

Combs, 785 F.2d at 978 (emphasis added). *See also Lucero v. Chadwick*, 121 F.3d 591 (11th Cir.1991) (citing *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994))(interpreting injunction in light of *the record* before the court); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982)(reviewing the *facts in the record* before the court in analyzing the remedial nature of an injunction). Notably, the Attorney General fails to address or apply these holdings. The court finds that when read in conjunction with the court's other Orders, or even when read facially, the Parties enjoined understand their obligations under the Permanent Injunction, and except as noted, *infra*, the provisions of the Permanent Injunction challenged by the Attorney General are constitutionally sound, are not vague and overbroad, and are in conformance with standing Supreme Court and Eleventh Circuit precedent.

In contrast to disagreeing about whether the Permanent Injunction, as a whole, should be read standing alone or in conjunction with other pleadings, the Parties agree that internally, "the Injunction must clearly and sufficiently delineate permissible and impermissible conduct." (Defs.' Reply at 9; Pls.'

Opp'n at 6 ("The parties being enjoined have the right to know what activities are prohibited").) What is required is "the language of the injunction to be as specific as possible under the totality of the circumstances, such that a reasonable person could understand what conduct is proscribed." *United States v. Kaun*, 827 F.2d 1144, 1153 (7th Cir.1987); *see also Howard Johnson Co., Inc. v. Khimani*, 892 F.2d 1512, 1516 (11th Cir.1990) (utilizing "reasonable person" standard in interpreting provision of a district court's permanent injunction and upholding finding of contempt); *Fed. R. Civ. P.* 65(d) (injunctions should "describe in reasonable detail ... the act or acts sought to be restrained"); (Defs.' Mem. In Supp. at 5 (citing to *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926) for the correlative principle that "a statute is void if *persons of common intelligence* must necessarily guess at its meaning and differ as to its application") (emphasis added)). Rule 65 is not to be applied strictly; the inquiry is whether the "parties subject to the injunctive order understood their obligations under the order." *Williams v. City of Dothan, Ala.*, 818 F.2d 755, 761 (11th Cir.1987) (citing *Combs*, 785 F.2d at 978-79).

The Attorney General asserts that "school administrators all across the state are questioning the meaning of this Court's Permanent Injunction." (Defs.' Reply at 3 n. 2.) This assertion is unsubstantiated by any supportive filings, and noticeably fails to address the question of whether the *DeKalb County Board of Education and its individual members* understand its/their

obligations under the Permanent Injunction.[19] In contrast to the Attorney General's unsupported, self-serving assertion, the DeKalb County Board of Education ("School Board"), *the entity for which the Attorney General purports to speak*, has submitted its "Report to Court of Counsel of DeKalb County Board of Education, et al." In that document, the School Board, individually and acting as a School Board, and the Superintendent, acting through counsel, delineated their efforts "to comply with all open orders of this court in good faith." (DeKalb Sch. Bd. Report To Ct. at 1.) Counsel for the School Board indicated that the following activities had been undertaken pursuant to the court's previous Orders and the court's Permanent Injunction:

(1) A September 30, 1997 in-service for principals, assistant principals and certain administrative personnel of the DeKalb County School System. (*Id.*)

(2) Distribution, at the September 30, 1997 in-service, of a memorandum, composed by School Board legal counsel,

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[19] It is indeed ironic that the Attorney General claims state-wide mass confusion in one forum--this court, but then states that the Permanent Injunction applies only to DeKalb County in another--the media. (*See* Attachment B, December 8, 1997 Press Release from the Office Of The Attorney General ("AG December 8, 1997 Press Release") (stating that "many people in Alabama mistakenly believe the recent federal injunction strictly regulates religious expression in every school in the state, when in fact, these prohibitions only apply to the DeKalb County school system"); *see also*, Pls.' Add. Evid.)

explaining the court's Orders and including a copy of the court's March 12, 1997 Memorandum Opinion and Order. (*Id.* at 2.)

(3) The distribution of a memorandum concerning "Student Prayer *en mass* During Lunch" to all principals and other interested persons in the DeKalb County School System on October 2, 1997. (*Id.*)

(4) The mailing of information to all principals, teachers and administrative personnel concerning questions involving religious activities in school on October 21, 1997. (*Id.*)

(5) Submission of a memorandum concerning "Religion in Schools" on October 24, 1997. (*Id.*)

(6) Distribution of documents entitled "Outline of Permanent Injunction of October 29, 1997, What the Board of Education Must Do," and "Outline of Permanent Injunction of October 29, 1997, What We Can and Can't Do" across the DeKalb County School System and to any interested citizen on October 29, 1997. (*Id.* at 5-6.)

(7) Distribution of a position paper or November 5, 1997. (*Id.* at 6.)

Additionally, the Report indicates that the School Board and the Superintendent have undertaken the following in compliance with the Permanent Injunction:

October 30--Memo to Superintendent outlining proposed in-service for principals.

October 31--Principal's in-service meeting. Copies of the following given to each principal:

Permanent Injunction

Timeline of Major Required Activities

Riley Letter

Outline of Permanent Injunction

Copy of Alabama Code 16-1-20.3

November 4--Letter to Gideon's International with copy of Permanent Injunction attached.

November 4--Memo outlining conversation with Mr. Jay Kaiman, Anti-defamation League.

November 6--Memo to Superintendent outlining proposed meeting with local Gideons.

November 8--Meeting with local Gideons. Copies of Permanent Injunction distributed.

November 10--Notification of Permanent Injunction to all teachers.

November 10--Meeting with Association Teacher Representatives, DeKalb County Education Association.

November 12--Memo concerning proposed meeting with Assistant Principals.

November 14--Memo outlining discussion points with Charles Haynes, First Amendment Center.

November 14--Memo to all school [sic] asking for names and addresses of all PTO officers.

November 18--Letter to Plaintiff's [sic] Attorney proposing candidates for monitor and copy of "Finding Common Ground" for preview.

November 24--Fax communication from First Amendment Center.

November 25--Board of Education approves policy "Distribution of Literature--Student Rights and Protection". [sic]

November 25--Copy of proposed policy mailed to Plaintiff's [sic] Attorney.

(DeKalb Sch. Bd. Report To Ct. at 3-4.)[20]

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[20] The reporting Defendants further informed the court that "substantial pressure has been exerted toward persons attempting to comply with the orders of this court. The defendants have experienced great criticism regarding their position." (DeKalb Sch. Bd. Report To Ct. at 4.) In addition to copies of the distributed documents outlined above, copies of representative articles, editorials, and letters published since September 30, 1997 for and against the position of the reporting Defendants were attached. (*Id.*)

The court notes the difficult position in which some enjoined Defendants are placed by the provisions of the court's Permanent Injunction. Nevertheless, appointment or election to public office does not justify imposition of personal or political views contrary to established law. There is no doubt that some of the criticism is heightened by political agitation. But, the DeKalb School Board and its individual members would not have found themselves "experienc[ing] great criticism regarding their position" if they had complied with long-standing legal precedent from the beginning. While the court is sympathetic to Defendants' situation, it is, ultimately, one of their own making.

The court does, however, recognize and specifically command the School Board, its Superintendent, and their counsel for their good faith efforts to comply with the Orders of the court. Apart from the November 7, 1997 activities at a Sylvania High School football game, *which greatly concern the court*, and which should also greatly concern the School Board, a cursory review of the December 4, 1997 Report To

To ensure that enjoined parties receive adequate notice of the precise conduct that is prohibited, Rule 65 requires that an injunction be specific in its terms and describe in reasonable detail the act or acts enjoined. *Fed. R. Civ. P.* 65(d); *Alabama Nursing Home Association v. Harris*, 617 F.2d 385 (5th Cir.1980).[21] In reading the terms of an injunction, the *Harris* court noted that "[a]n injunction does not prohibit those acts that are not within its terms as *reasonably construed.*" *Harris*, 617 F.2d at 388. In *Schering Corp. v. Illinois Antibiotics Co.*, 62 F.3d 903 (7th Cir.1995), *reh'g denied* (Sept. 12, 1995), the Seventh Circuit articulated why a *reasonable* construction is necessary: "[T]he rule of strict construction of injunctions

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Court, along with its attachments, evidence a concerted effort to not only rectify, but to educate, inform, and to obey the law, like it or not. As counsel for the School Board noted in an October 21, 1997 memorandum to DeKalb County School System principals, teachers, and administrative personnel addressing questions concerning religious activity in school: "The school prayer case is bleeding our educational system here in DeKalb County of financial resources we desperately need. Our teachers need to recognize this fact and govern themselves accordingly.... *If you are not running for public office, or have some other hidden agenda, please become part of the solution and don't become part of the problem.*" (DeKalb Sch. Bd. Report To Ct., October 21, 1997 Mem. at 7-8 (emphasis added).)

[21] Decisions of the former Fifth Circuit rendered prior to October 1, 1981, constitute binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc).

should not be pressed to a dryly logical extreme. If narrow literalism is the rule of interpretation, injunctions will spring loopholes ... and parties in whose favor injunctions run will be inundating courts with requests for modification in an effort to plug the loopholes." *Id.* at 906. Equally apparent is that unreasonable constructions and "narrow literalism" will lead to precisely the type of hypothetical "loopholes" offered by the Attorney General as examples of the Permanent Injunction's infirmity. The terms of the court's Permanent Injunction must be read reasonably, logically, and in their entirety; not in the selective splicing of words and phrases that inundate the Attorney General's Motion and Memorandum In Support thereof. [24]

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[24] The Attorney General appears to recognize the basic maxim that particular words and phrases in any judicial order or legislative enactment should ordinarily be read logically and consistently with the other words and phrases in the same sentence, paragraph, and/or Order, as applicable. In Defendants' Reply, the Attorney General cites *United States v. Kaun*, 827 F.2d 1144 (7th Cir.1987) "for the principle that the injunction should be viewed under a totality of circumstances through the eyes of a reasonable person." (Defs.' Reply at 4.)

Nevertheless, as Plaintiffs note, in challenging provisions of the Permanent Injunction as vague and overbroad, the Attorney General's "examples are themselves vague, being spectres intended to induce fear and horror, rather than concrete factual situations." (Pls.' Opp'n at 9.) Certainly the majority of the Attorney General's "narrow literalism" is not in keeping with *Harris* ' admonition to reasonably construe the terms of an injunction or with the Attorney General's own reading of *Kaun*.

Following, is a restatement of the challenged provisions of the Permanent Injunction followed by a summarization of the Attorney General's objections. Except for the court's analysis under section 6(e), the court's analysis of the Attorney General's objections follow this restatement and summarization.

1. *Section 6(a)*

In its entirety, section 6(a) of the court's Permanent Injunction reads as follows:

> (a) *Regarding Classroom Activities and Instructional Settings.* The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, or permitting *school organized* or *officially sanctioned* religious activity in the classrooms of DeKalb County schools *including, but not limited to:* vocal prayer; Bible and religious devotional or scriptural readings; distribution of religious materials, texts, or announcements; and discussions of a devotional/inspirational nature, regardless of whether the activity is initiated, led by, or engaged in by students.
>
> This PERMANENT INJUNCTION DOES NOT proscribe the educational use of religious texts in the classroom to the extent that material so used is presented in an objective and academic manner, for example, as part of a course of study.

This PERMANENT INJUNCTION DOES NOT proscribe students' voluntary expression of their own religious beliefs in the form of homework, reports, artwork, or other school assignments as applicable and as academically appropriate.

This PERMANENT INJUNCTION DOES NOT proscribe the display of religious symbols, articles and medals (for example, Crosses and Stars of David) and/or clothing bearing religious messages (provided that the school allows students to display non-religious expressive symbols and apparel and such display is in accordance with all applicable time, place, and manner restrictions).

This PERMANENT INJUNCTION DOES NOT affect the rights of secondary-school students to engage in religious activity during noninstructional time that is consistent with the federal Equal Access Act, 20 U.S.C. Section 4071 *et seq.*, or to quietly engage in religious activity during noninstructional times, *so long as it does not unduly call attention thereto and so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its imposition upon themselves.*

This PERMANENT INJUNCTION DOES NOT

> prohibit students from distributing religious materials to classmates during noninstructional time, subject to the same time, place, and manner restrictions imposed on student distributions of nonreligious materials, subject to the provisions of paragraph 6(e) below.

(*See* Permanent Inj. at 3-4 (emphasis in original).) Not only a reasonable reading, but even a narrowly literal reading, discloses that what this provision prohibits is:

(1) *School organized* or *officially sanctioned* religious activity in the classrooms of DeKalb County schools *including, but not limited to* vocal prayer.

(2) *School organized* or *officially sanctioned* religious activity in the classrooms of DeKalb County schools *including, but not limited to* Bible and religious devotional or scriptural readings.

(3) *School organized* or *officially sanctioned* religious activity in the classrooms of DeKalb County schools *including, but not limited to* distribution of religious materials, texts, or announcements.

(4) *School organized* or *officially sanctioned* religious activity in the classrooms of DeKalb County schools *including, but not limited to* discussions of a devotional/inspirational nature, regardless of whether the activity is initiated, led by, or engaged in by students.

Clearly, this provision enjoins *school organized*, or

officially sanctioned religious activity.[25] As other provisions of the Permanent Injunction clearly articulate, **students are free to engage in any or all of these activities as long as they are not *school organized* or *officially sanctioned*.** For example, as the court took pains to note, the Permanent Injunction does not proscribe: (1) the educational use of religious texts in the classroom to the extent that the material is presented in an objective and academic manner; (2) students' voluntary expression of their own religious beliefs in the form of various school assignments as applicable and as academically appropriate; (3) the display of religious symbols or clothing bearing religious messages consistent with a school's applicable time, place and manner restrictions; (4) secondary-school students from engaging in religious activity during noninstructional time consistent with the Equal Access Act; (5) secondary-school students from "quietly engag[ing] in religious activity during noninstructional times, so long as it does not unduly call attention thereto and so long as it does not interfere with the rights of other students to freely pass thereby or to

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[25]The Attorney General admits that he is not challenging "*the Permanent Injunction's proscriptions with regard to school sponsored, officially organized religious activity,*" and that "[t]his law is settled." (Defs.' Reply at 10 (emphasis in original).) Nevertheless, the Attorney General then proceeds to challenge section 6(a), which a literal reading discloses merely enjoins "*school organized* or *officially sanctioned* religious activity." (Permanent Inj. at 3.)

avoid its imposition upon themselves" (Permanent Inj. at 4);[26]

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[24] The Attorney General particularly objects to the word "quietly" and the phrase "so long as it does not unduly call attention thereto" in one paragraph of section 6(a) as unduly vague and in violation of *Tinker v. Des Moines School District*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969). (Defs.' Mem. In Supp. at 8.) Specifically, *Tinker* provides that proscriptions be tailored to "the requirements of appropriate discipline in the operation of the school." *Id.* at 509.

In context, these words are part of section 6(a)'s proscription of school organized or officially sanctioned religious activity. They are stated in the fourth of four paragraphs detailing what the Permanent Injunction *does not* proscribe. They are part of the court's notation that "[t]his PERMANENT INJUNCTION DOES NOT affect the rights of secondary-school students to engage in religious activity during noninstructional time that is consistent with the federal Equal Access Act ..., or to *quietly* engage in religious activity during noninstructional times, *so long as it does not unduly call attention thereto and so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its imposition upon themselves.*" (Permanent Inj. at 4 (italics in original) (underlining added).)

Consistent with *Tinker*, and with the court's emphasis on applying identical time, place, and manner restrictions to religious and other types of conduct, a more detailed enunciation perhaps could read: "This PERMANENT INJUNCTION does not affect the rights of secondary-school students to engage in religious activity during noninstructional time that is consistent with the federal Equal Access Act ..., or to engage in religious activity during noninstructional times *so long as it does not interfere with the rights of other students, is consistent with the school's applicable time, place, and manner restrictions regarding any other type of conduct during noninstructional times, and such policy is enforced consistently, regardless of the content of the conduct being proscribed.*"

The court finds that the words underlined above may not be

and (6) student distribution of religious materials to classmates during noninstructional time, subject to the same time, place and manner restrictions imposed on student distributions of nonreligious materials.[27] Not only a reasonable, but a literal

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sufficiently narrowly tailored, and thus finds that the Motion To Stay as to these twelve words of the court's three-thousand, seven-hundred and fourteen word Permanent Injunction is due to be granted. *In staying the word "quietly," and the phrase "so long as it does not unduly call attention thereto and," however, the court notes that it is* ***merely clarifying what students have always been allowed to do consistent with the Permanent Injunction and established First Amendment law: engage in religious activity that is not officially sanctioned or coerced and that does not infringe on the rights of others.*** *See Tinker*, 393 U.S. at 513.

The Parties are put on notice, however, that inconsistent enforcement of school rules that work to favor religious conduct over other types of conduct may be construed as state promotion or indorsement of religion or a particular religion over other religions or non-religion. The First Amendment requires the government to remain strictly neutral among religions and between religion and non-religion. *Jager*, 862 F.2d at 828. Further, as the *Tinker* court noted: **"[C]onduct by the student, in class or out of class, which for any reason--whether it stems from time, place or type of behavior--materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."** *Tinker*, 393 U.S. at 513 (emphasis added).

[25] Here, the Permanent Injunction refers readers to section 6(e), where the court requires DeKalb County to promulgate "a written policy of general application for all DeKalb County public schools ... to govern such distributions in terms of time, place, and manner restrictions." (Permanent Inj. at 9.) In 6(e), the court reemphasizes that the Permanent Injunction

reading of the terms of section 6(a) shows a clear delineation between "*school organized* or *officially sanctioned* religious activity," (Permanent Inj. at 3), and non-school organized, non-officially sanctioned student conduct.

Nevertheless, the Attorney General contends that under his reading of section 6(a), the following could be prohibited:

(1) Discussions in a history class dealing with the contributions of historical figures to modern day society. (Defs.' Mem. In Supp. at 5.)

(2) Discussions of the meaning or origin of certain state-recognized holidays. (*Id.* at 1, 6.)

(3) Bible reading and discussion among students in a study hall or homeroom period, even if not disruptive of the classroom setting. (*Id.;* Defs.' Reply at 11.)

(4) Student-initiated Bible Club meetings on campus after school hours. (*Id.* at 7.)

(5) Students praying before lunch. (Defs.' Reply at 12.)

(6) A student giving a flyer to another student about an event at his church or youth group.

2. *Section 6(b)*

In its entirety, section 6(b) of the court's Permanent Injunction reads as follows:

"DOES NOT prohibit student distribution of religious materials to classmates during noninstructional time, subject to the same time, place and manner restrictions imposed on student distribution of nonreligious materials." (Permanent Inj. at 10.)

(b) *Regarding Graduation or Commencement Exercises.* The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, participating in, or permitting, prayers, invocations, benedictions, or devotional messages at graduation or commencement exercises, regardless of whether such prayer, invocation, benediction, or devotional message is offered by clergy, a student, administrator, teacher, school employee, or nonschool person, regardless of how such prayer, invocation, benediction, or devotional message is denominated, and regardless of whether a public-address system is used. The Defendants, and each of them, are specifically PERMANENTLY ENJOINED from permitting such activity at commencement or graduation exercises in the guise of valedictory, salutatory, historian, or similar student addresses and remarks.

This PERMANENT INJUNCTION DOES NOT proscribe a brief personal expression by a student which contains religious references during a commencement exercise or student address (for example, a student may express thanks to Deity for his

or her academic success),[28] provided that such expression is not encouraged in any way by school officials and does not invite audience participation or response (for example, a student speaker may not invite the audience to participate with him or her in prayer or urge the audience to take a moment with him or her to thank Deity). Where enjoined activity by students occurs, it is CONSIDERED that school officials be and they are hereby ORDERED to take appropriate disciplinary action as they would for any violation of school disciplinary rules, said disciplinary action being calculated to cause the cessation of the violative conduct as it occurs and to deter similar conduct in the future.

The Defendants, and each of them, are further PERMANENTLY ENJOINED from listing, announcing, or memorializing any religious activity or message on any commencement program at any DeKalb County school. The Defendants, and each of them, are specifically PERMANENTLY ENJOINED

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[26] This is but one example of a brief permissible reference by a student to Deity or religion. This example is not meant by the court to suggest any form of expression to any student or to suggest that this is the only such reference that would be permissible. It is intended to be illustrative only, and to assist school officials in complying with the terms of this PERMANENT INJUNCTION. (Permanent Injunction at 5 n. 1.)

> from printing baccalaureate announcements or commemorations or other materials regarding baccalaureate services on the commencement programs of DeKalb County public schools and from organizing or sponsoring any baccalaureate event (although they may attend). School officials are prohibited from encouraging or discouraging, directly, or indirectly, a student's attendance at baccalaureate services. Specifically, school officials may not condition a student's attendance at commencement exercises on attendance at baccalaureate events.

(*See* Permanent Inj. at 4-6 (emphasis in original).)

Prohibited under section 6(b) are:

(1) Prayers, invocations, benedictions, or devotional messages at graduation or commencement exercises.

(2) Such activity in the guise of valedictory, salutatory, historian, or similar student addresses and remarks.

(3) The listing, announcing, or memorializing of any religious activity or message on any commencement program at any DeKalb County school.

(4) The printing of baccalaureate announcements or commemorations or other materials regarding baccalaureate services on the commencement programs of DeKalb County public schools.

(5) The organization or sponsorship of any baccalaureate event by school officials.

(6) School officials encouraging or discouraging, directly or

indirectly, a student's attendance at baccalaureate services.

(7) School officials conditioning a student's attendance at commencement exercises on attendance at baccalaureate events.

Prayers, invocations, benedictions, or devotional messages at graduation or commencement exercises are prohibited regardless of whether offered by clergy, a student, administrator, teacher, school employee, or nonschool person, regardless of how denominated, and regardless of whether a public-address system is used. When violations occur, school officials are directed to take "appropriate disciplinary action as they would for any violation of school disciplinary rules." (Permanent Inj. at 6.)

Again, the court took pains to note what section 6(b) does not proscribe:

(1) A brief personal expression by a student which contains religious references during a commencement exercise or a student address that is not encouraged by school officials and that does not invite audience participation or response.[29]

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[27] The court specifically noted that a student may express thanks to Deity for academic success and emphasized that the court was not suggesting that this was the only such reference that would be permissible. The court's example was meant to be "illustrative only," and articulated to "assist school officials in complying with the terms of this PERMANENT INJUNCTION." (Permanent Inj. at 5 n. 1 (emphasis in original).)

The court also explained that the permissible "personal expression by a student ... may not invite the audience to participate with him or her in prayer or urge the audience to take a moment with him or her to thank Deity." (Permanent Inj. at 5-6.)

The Attorney General contends that section 6(b) is vague, (Defs.' Mem. In Supp. at 9; Defs.' Reply at 12), and under his reading of section 6(b), a student valedictorian could be prohibited from explaining why Mother Teresa was an inspiration for his or her success. (Defs.' Reply at 12.) The Attorney General also contends that when he reads section 6(b) literally, it: (1) could require the school to "police all in attendance" (Defs.' Mem. In Supp. at 9); (2) discriminates against private religious speech based on its content and viewpoint (*Id.* at 9-11); (3) would lead to school officials censoring a student graduation speaker's thoughts before a speech was given (Defs.' Mem. In Supp. at 2); (4) violates the Establishment Clause by requiring state entanglement with religion (*Id.* at 11-12); and (5) violates Supreme Court and Eleventh Circuit precedent. (*Id.* at 12-14.)

3. *Section 6(c)*

In its entirety, section 6(c) of the court's Permanent Injunction reads as follows:

> (c) *Regarding Use of Public-Address Systems for Religious Addresses.* The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting commanding, counseling, inducing, ordering, procuring, participating in, or permitting, students, school employees, school officials, clergy, and nonschool persons to pray or to deliver religious or

devotional messages (including scriptural readings) over any public-address system during the instructional day (including the home room period) or in connection with any school-sponsored event, including, but not limited to, assemblies and sporting events. This provision includes the delivery of daily announcements. No exception to this provision shall be permitted during times of perceived crisis or exigent circumstances. Where enjoined activity by students occurs, it is CONSIDERED that school officials be and they are hereby ORDERED to take appropriate disciplinary action as they would for any violation of school disciplinary rules, said disciplinary action being calculated to cause the cessation of such violative conduct as it occurs and to deter similar conduct in the future.

This PERMANENT INJUNCTION DOES NOT prohibit students from making announcements over the school public-address system regarding meetings of noncurricular religious clubs, provided that the announcements themselves do not contain a prayer or devotional, and provided that any such announcements are subject to the same time, place, and manner restrictions that apply to announcements of nonreligious activities.

(Permanent Inj. at 6-7 (emphasis in original).)

Activity prohibited under section 6(c) includes:

(1) The delivery of prayers, religious or devotional messages (including scriptural readings) over any public-address system during the instructional day, including: the home room period, the delivery of daily announcements, and in connection with any school-sponsored events.

When violations by students occur, school officials are directed to "take appropriate disciplinary action as they would for any violation of school disciplinary rules." (Permanent Inj. at 7.) The court specifically noted that students could make announcements over a school public-address system "regarding meetings of noncurricular religious clubs, provided that the announcements themselves do not contain a prayer or devotional, and provided that any such announcements are subject to the same time, place, and manner restrictions that apply to announcements of nonreligious activities." (Permanent Inj. at 7.)

The Attorney General contends that 6(c)'s restrictions regarding the use of school public address systems for religious addresses are unconstitutional because they are vague and overbroad. (Defs.' Mem. In Supp. at 14-15.) Under his reading of this provision: (1) "Muhammad Ali would not be able to address the student body and share his life's [sic] story;" and (2) "school officials would be required to censor all student speeches which occur as part of any school assembly." (Defs.' Mem. In Supp. at 2.)

4. *Section 6(d)*

In its entirety, section 6(d) of the court's Permanent Injunction reads as follows:

> (d) *Regarding School-Sponsored Assemblies and Events.* The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, or otherwise participating in, or permitting, prayers, Biblical and scriptural readings, and other presentations or activities of a religious nature, at all *school-sponsored or school-initiated* assemblies and events (including, but not limited to, sporting events), regardless of whether the activity takes place during instructional time, regardless of whether attendance is compulsory or noncompulsory, and regardless of whether the speaker/presenter is a student, school official, or nonschool person.
>
> This PERMANENT INJUNCTION DOES NOT prevent secondary-school students from engaging in religious expression and activity during noninstructional time that is consistent with the federal Equal Access Act, 20 U.S.C. Section 4071 *et seq.*, which, while according students expressive rights, does not allow school officials to provide special privileges to noncurricular student religious clubs in terms of meetings and assemblies that they do not provide to other student clubs.

(Permanent Inj. at 7-8 (emphasis in original).)

Section 6(d) prohibits:

(1) Prayers, Biblical and scriptural readings, and other presentations or activities of a religious nature, at all *school-sponsored* or *school-initiated* assemblies and events, regardless of whether the activity takes place during instructional time, whether attendance is compulsory or noncompulsory, and regardless of the speaker.

The court noted that the Permanent Injunction did not interfere with the Equal Access Act, and specifically noted that the Act accords students expressive rights but "does not allow officials to provide special privileges to noncurricular student religious clubs in terms of meetings and assemblies that they do not provide to other student clubs." (Permanent Inj. at 8.)

Section 6(d) is challenged because the Attorney General reads its provisions to be "grossly overbroad" and "literally would prevent: (1) a parent from praying silently in the stands at a football game" (Defs.' Reply at 13); (2) "a group of football players gathering together before a school game to pray" (Defs.' Mem. In Supp. at 15-16); (3) "a football player who scores a touchdown during a game from kneeling down in the endzone to pray" (*Id.* at 16); and (4) the singing of "Silent Night" and other songs at a school Christmas play or concert. (*Id.*)[30]

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[28] After a detailed search of the Permanent Injunction, the March 1997 Memorandum Opinion and Order, the November 1997 Memorandum Opinion and Order, and the November 1997 Supplemental Opinion and

5. *Section 6(e)*

In its entirety, section 6(e) of the court's Permanent Injunction reads as follows:

> (e) *Regarding Distribution of Bibles and Other Religious Tracts.* The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, or otherwise permitting, school officials or nonschool persons to enter any classroom or any school property where students are assembled, for the purpose of distributing Gideon Bibles or other religious tracts, literature, or paraphernalia to students on school property during the school day, including the home room period and any period during which students are required to be present in school, or at any

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Order, the court can find no reference to a ban on the singing of "Silent Night" or other songs at a school Christmas play or concert. *Any* school sponsored or officially sanctioned activity must simply comport with standing Supreme Court and Eleventh Circuit law, as well as the terms of the court's Permanent Injunction. Clearly read, section 6(d) prohibits such activities that are *primarily* of a "religious nature." As section 6(a) notes, the expression of religious material in an objective, academically appropriate manner is clearly permissible. And, as section 6(c) notes, "religious or devotional" messages may not be delivered over a public address system during the instructional day. Section 6(d) merely proscribes the delivery of such *officially sanctioned, content-focused messages in school-sponsored assemblies and events.*

school-sponsored event.

No distribution of Gideon Bibles or other religious tracts, literature, or paraphernalia by placement of them in a common area shall occur in the absence of a formal, written policy adopted by the DeKalb County Board of Education governing distribution of materials from nonschool persons in DeKalb County public schools generally.

It is further CONSIDERED that Defendants be and the same are hereby ORDERED that within thirty (30) days of the date of this PERMANENT INJUNCTION, Defendants shall promulgate a written policy of general application for all DeKalb County public schools, binding upon all school principals, teachers, and other school employees uniformly in each public school in DeKalb County, to govern such distributions in terms of time, place, and manner restrictions; and Defendants shall serve a copy of the same upon Plaintiffs' counsel, who, within ten (10) days, shall list any objections, and shall submit the same to this court for its rejection or concurrence. Following court approval, the Defendants shall publish and shall distribute to each school principal a copy of the written policy, with instructions that it shall be followed in each DeKalb County public school.

It is further CONSIDERED that Defendants be and the same are hereby ORDERED to provide *immediately* to the Gideons International representatives who are known by them to have visited DeKalb County schools, or to their designated organizational representative, a copy of this PERMANENT INJUNCTION.

It is further CONSIDERED that Defendants be and the same are hereby ORDERED to inform the organization in writing, *immediately,* that students shall not be harassed with regard to acceptance or nonacceptance of any Gideon Bibles that may occur while its representatives are situated on public property near the school, (such as the public sidewalk), if students who are approached for distribution are still situated on or boarding school property, and that they shall not throw or pass Gideon Bibles through the windows or doors of DeKalb County school buses or otherwise act in an aggressive manner toward students with regard to any distribution of Gideon Bibles while those students are still situated on school property (for example, standing in line in the school parking lot to board the bus and still under school officials' general supervision and protection, or boarding the public school bus).

It is further CONSIDERED that Defendants be and the same are hereby ORDERED to send a copy of this written notification to Plaintiffs' counsel and to file a copy with the court.

It is further CONSIDERED that Defendants be and the same are hereby ORDERED to follow the exact steps enumerated herein for any nonschool group or person other than the Gideons International that wishes to have access to students for the purpose of distributing Bibles, religious tracts, religious literature, or religious paraphernalia.

In the event of a violation of this PERMANENT INJUNCTION, and in the event of aggressive or harassing behavior of the sort proscribed herein, school officials shall take action to cause the violative conduct to cease immediately.

This PERMANENT INJUNCTION DOES NOT prohibit students from distributing religious materials to classmates during noninstructional time, subject to the same time, place and manner restrictions imposed on student distributions of nonreligious materials.

(Permanent Inj. at 8-11 (emphasis in original).)

The Attorney General challenges section 6(e), contending that it "violates the Gideon's right to distribute religious

literature in a traditional public forum without a compelling state interest." (Defs.' Mem. in Supp. at 17; *see also* Defs.' Reply at 16-21.) Plaintiffs contend that the Attorney General does not have standing "to challenge the alleged chilling of the Gideons' alleged free-speech rights." (Pls.' Opp'n at 30.) This, Plaintiffs argue, "is the Gideons' burden." (*Id.*) The Attorney General counters that he does have standing because: (1) "the Attorney General has both a legal right and an obligation to defend the constitutional rights of the citizens of Alabama" (Defs.' Reply at 14); (2) "the Attorney General has sworn, under oath, to abide by the laws of the State of Alabama and the United States, and at all times to secure their enforcement" (*Id.* at 15); (3) as "a named party to this lawsuit ... the Attorney General has every right to raise vagueness/overbreadth issues which arise in the course of this litigation" (*Id.*); and (4) the Attorney General represents the State and DeKalb County Boards of Education, the Permanent Injunction requires these Parties to take steps which the Attorney General contends "will chill the free speech rights of a party," and "[c]onsequently, the Attorney General has standing, on behalf of his clients, and himself individually, to raise the Gideon's free speech rights." (*Id.*)

Although the court has doubts regarding the Attorney General's ability to speak for the Gideons, *see Lucero*, 121 F.3d at 605 n. 25 (quoting *Madsen*, 512 U.S. at 775-77 ("[Defendants] themselves are named parties in the order, and they therefore lack standing to challenge a portion of the order applying to persons who are not parties")), regardless of the

standing issue, a reasonable and literal reading clearly shows that section 6(e) merely prohibits:

(1) School officials or nonschool persons from entering any school property where students are assembled, for the purpose of distributing Gideon Bibles or other religious tracts, literature, or paraphernalia to students *on school property during the school day* or at any *school sponsored* event.

(2) The distribution of Gideon Bibles, religious tracts, literature, or paraphernalia by placement in a common area *absent* a "formal, written policy ... governing distribution of materials from nonschool persons in DeKalb County public schools generally." (Permanent Inj. at 8-9 (emphasis added).)

As noted above, section 6(e) specifically emphasizes that the Permanent Injunction "DOES NOT prohibit students from distributing religious materials to classmates during noninstructional time, subject to the same time, place and manner restrictions imposed on student distributions of nonreligious materials." (Permanent Inj. at 11 (emphasis in original).) In its November 1997 Supplemental Opinion and Order, the court also stated that:

> The court does not wish by the terms of its injunction to discriminate against the Gideons International. The court does not intend by its injunction to single out the Gideons for discriminatory treatment or to infringe upon their free-speech rights. By the same token, the court is disturbed by the absence of uniform regulation by school officials and the 'gap' this leaves in the

> delicate area of the interplay between the rights of nonschool persons and students. It is for this reason that the court's injunction makes reference to the location of students. The court takes it as a simple truism that, where the public schools are concerned, adult nonschool persons cannot harass or act aggressively toward students in regard to distributing *any* materials, religious or otherwise. Such conduct would not be reasonable in time, place and *manner*.

(November 1997 Supp. Op. and Order at 51-52.)

Section 6(e) also requires the following:

(1) A promulgated, written policy applicable in all DeKalb County public schools governing distributions in terms of time, place, and manner restrictions.

(2) Publication and distribution of a written copy of such policy with instructions that it shall be followed to each school principal, with instructions that it shall be followed in each DeKalb County public school.

(3) That a copy of the Permanent Injunction be provided to the Gideons.

(4) That the Gideons be informed in writing "that students shall not be harassed with regard to acceptance or nonacceptance of any Gideon Bibles that may occur while its representatives are situated on public property near the school ... *if* students who are approached for distribution are still situated on or boarding school property...." (Permanent Inj. at 10 (emphasis in original).)

(5) That the Gideons be informed additionally, that "they shall not throw or pass Gideon Bibles through the windows or doors of DeKalb County school buses or otherwise act in an aggressive manner toward students with regard to any distribution of Gideon Bibles while those students are still situated on school property...." (Permanent Inj. at 10.)[31]

(6) That the same steps be followed "for any nonschool group or person other than the Gideons International that wishes to have access to students for the purpose of distributing Bibles, religious tracts, religious literature, or religious paraphernalia." (*Id.*)

(7) That school officials "take action to cause ... violative conduct to cease immediately" in the event of violations of the injunction and in the event of "aggressive or harassing behavior of the sort proscribed herein." (*Id.*)

Regardless of the standing issue, on November 18, 1997, the Superintendent of Education for the DeKalb County Board of Education provided to the court a copy of a November 4, 1997 correspondence sent to the Gideons International. The Superintendent informed the court that, in addition to sending such correspondence to the Gideons International, he had met with local leaders of the Gideons International "to present the injunction and answer questions." (November 18, 1997

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[29]The court specifically noted that "still situated on school property" meant, for example, while students were ... "standing in line in the school parking lot to board the bus and still under school officials' general supervision and protection, or boarding the public school bus." (Permanent Inj. at 10.)

Correspondence from Superintendent of Educ. to the court, Attachment A.)[32] On November 25, 1997, Plaintiffs filed a pleading indicating the DeKalb County Board of Education's compliance with section 6(e). The substance of the correspondence from the DeKalb County Board of Education to the Gideons International reads as follows:

> Please find attached to this letter a copy of a permanent injunction issued by Judge Ira DeMent of the United States District Court for the Middle District of Alabama, Northern Division.
>
> Judge DeMent has ordered that you be provided with a copy of this injunction and that you be informed that students shall not be harassed with regard to acceptance or nonacceptance of any Gideon Bibles while Gideon representatives are situated on public property near the school, and that Gideons shall not throw or pass Gideon Bibles through the windows or doors of school buses or otherwise act in an aggressive manner toward students with regard to any distribution of Gideon Bibles while those students are still situated on school property.

(*See* November 4, 1997 Correspondence from DeKalb County Bd. of Educ. Superintendent of Educ. to the Gideons International, Pls.' Notice of Compliance, Ex. A.)

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[30] This information was also reported in the DeKalb School Board's December 4, 1997 Report To Court.

Further, on December 2, 1997, Plaintiffs filed their "Notice Of No Objection To DeKalb County Board Of Education's Policy Regarding Distribution Of Materials By Nonschool Persons." ("Pls.' Notice of No Objection"). Plaintiffs state that "they have confirmed in a conversation with DeKalb County counsel that the policy proposed ... as to distribution of nonschool materials was in fact adopted by the DeKalb County Board of Education last week." The policy reads as follows:

> **Distribution of Literature: Student Rights and Protection**
>
> The DeKalb County School Board of Education recognizes the right of students to distribute literature on public school property, subject to reasonable time, place and manner restrictions imposed by the school. Such restrictions should be reasonable and must apply evenly to all nonschool student distributed literature. DeKalb County schools may prohibit the distribution of literature that is obscene, defamatory, or disruptive of the educational environment.
>
> The DeKalb County Board of Education prohibits the distribution by DeKalb County school board employees and nonschool individuals of commercial, political, religious or promotional materials to students on public school property.

(Pls.' Notice of No Objection, Ex. A, proposed policy for literature distribution.)

Clearly, the DeKalb County Board of Education understood

its obligations under section 6(e) of the Permanent Injunction. Not only did DeKalb County comply with those provisions addressing the Gideons International, it also complied with those provisions requiring the promulgation of a written policy governing the distribution of materials in DeKalb County schools. In correspondence dated November 25, 1997, the Superintendent of Education for DeKalb County stated that "[o]n Page 9 of the Permanent Injunction, provisions are made for a review and the listing of any objection within ten days. I will wait for Court approval, and possible revision, before officially implementing this policy in DeKalb County Schools." (*Id.*) Based on the foregoing, the court finds that, without addressing the propriety of section 6(e), the substantive provisions therein have been substantially complied with, and any objections relating thereto are accordingly moot.

6. *Section 7*

In essence, section 7 of the Permanent Injunction requires the following:

(1) The distribution of the court's opinions and Permanent Injunction to school principals in DeKalb County with instructions that each principal inform faculty, staff and students that the court requires compliance. (Permanent Inj. at 12.)

(2) That in each DeKalb County public school, a copy of the Permanent Injunction be made available or posted in areas commonly utilized for communicating notices or information to both students and faculty until the Permanent Injunction expires. (*Id.*)

(3) That a copy of "The Riley Letter" and a copy of the monograph entitled "Religion in the Public Schools: A Joint Statement of Current Law" remain available in each DeKalb County public school library until expiration of the Permanent Injunction. (*Id.*)

(4) That copies of the court's opinions and Permanent Injunction, together with a notice specifically articulated in the Permanent Injunction, be provided to groups organized for parental participation in school affairs at each DeKalb County public school. (*Id.* at 12-13.)

(5) That during the 1997-98 school year, Defendants conduct an in-service training session for faculty and administrators in DeKalb County public schools that is "reasonably designed to familiarize these school officials with the provisions of this Permanent Injunction, the general contours of Establishment Clause and Free Exercise principles as the court has explained them in its opinions in this case, their rights and duties in connection with the controlling law of church and state relations in the public-school setting, and the general issue of school officials' tolerance for diversity in religious opinion and duty of neutrality in matters of religion when acting in their official capacities." (*Id.* at 13.)

(6) That Defendants direct all new faculty and administrators not present for the 1997-98 in-service training to acknowledge in writing that they have read the curricular/teaching materials used at the 1997-98 in-service session. (*Id.*)

(7) That the curricular material used for the in-service be the court's opinions in this matter, together with a "program of religiously neutral, nonsectarian content selected by the DeKalb County School Board and submitted to the court-appointed monitor [for approval], with a copy served on Plaintiffs' counsel for the purpose of tendering specific written objections...." (*Id.* at 13-14.)

(8) That counsel for the School Board certify to the court on pre-determined dates each year, "that each school within the DeKalb County school system is in compliance with this Permanent Injunction." (*Id.* at 14.)

(9) That in conjunction with Plaintiffs' counsel, a monitor be nominated for the purpose of insuring compliance with the Permanent Injunction. (*Id.* at 15-16.)

(10) That the in-service session and monitor be paid for by the DeKalb County Board of Education. (*Id.* at 16.)

These enforcement provisions are challenged "[t]o the extent that section 7 requires school officials to enforce certain provisions of section 6." (Defs.' Mem. in Supp. at 22.) Section 7(e) is specifically challenged as vague because, according to the Attorney General, directing school officials to use a "program of religiously neutral, nonsectarian content," is not sufficiently clear. (*Id.*) Nevertheless, contrary to the Attorney General's purported failure to understand the requirements of section 7, the DeKalb County Board of Education and its members have made it patently clear that they understand the Permanent Injunction's requirements.

In addition to the Report to the court, (examined *supra*), on December 2, 1997, Plaintiffs filed a pleading entitled "Notice Of Agreement With DeKalb County Board Of Education's Nominee As Monitor, Notice Of Agreement With DeKalb County Board Of Education's Selection Of Course Materials, And Notice Of No Objection To DeKalb County Board Of Education's Policy Regarding Distribution Of Materials By Nonschool Persons." These pleadings illustrate to the court the DeKalb School Board's ability to understand the terms of the Permanent Injunction. *The court finds the Attorney General's assertion that the School Board does not understand its obligations under the Permanent Injunction curious, especially in light of the DeKalb School Board's filings.* The Attorney General would be well advised to communicate more fully with his purported client(s) before making assertions on its behalf.

7. Refutation of the Attorney General's Hypotheticals

The Attorney General's selective interpretation of the words and phrases in the challenged provisions of the court's Permanent Injunction is a prime example of what Plaintiffs contend to be the injection of "political divisiveness into these proceedings," (Pls.' Opp'n at 4 n. 8), and one of the "spectres intended to induce fear and horror" into the populace. (Pls.' Opp'n at 9.) The court has made patently clear in its Permanent Injunction, read reasonably and without "narrow literalism," and for that matter, in its other Orders, of which the Attorney General should have received copies, exactly what type of conduct is proscribed. The court has also taken pains to note

what is permissible under current Supreme Court and Eleventh Circuit precedent. Although clear under a reasonable and logical reading, the Attorney General has adduced hypothetical situations as a means of challenging the Permanent Injunction. In their Opposition to Defendants' Motion To Stay, Plaintiffs responded factually, legally, and with specificity, to the Attorney General's hypotheticals. The court hereby adopts the pertinent provisions of Plaintiffs' pleading presented below:

> Only by ignoring the plain language of the injunction, the teachings of this Court's March 12 opinion, and the facts as presented by the parties and found by the Court can one reach such astounding conclusions. And, only by ignoring 30-odd years of precedent can one reach the conclusion that the Attorney General is likely to succeed on appeal. As this Court pointedly noted in its November 12, 1997 Supplemental Opinion and Order, "[t]his federal district court does not judge it to be its province to adopt for Alabama" the case law of the Fifth Circuit, in the face of *Lee v. Weisman* and *Jager,* to name but two controlling cases. (*See* Supp. Op. at 42, Ex. A hereto.) Thus, the defendants' likelihood of success on appeal only exists if the Eleventh Circuit overrules *Jager,* a matter which this Court cannot prognosticate and which matter will shortly be in the hands of the only court that can preliminarily overrule or ignore it. *Jager* is now the law, and under *Jager,* the defendants have no

substantial likelihood of prevailing on appeal.

...

1. Students *can* read their Bibles during study hall [33]

The objection to the injunction as "vague" and "overbroad" purports to find that under these amorphous provisions, a student cannot read the Bible in study hall. As the Court was at pains to make clear in its March 1997 Memorandum Opinion, a copy of which was attached to the injunction, the Establishment Clause does not reach private student expression and activity. In its injunction, the Court similarly made it clear that only "school organized" or "officially sanctioned" religious activity falls within the

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[31] There might indeed be a situation in which a student is prohibited from reading his or her Bible during study hall, but only if that activity is "school organized" or "officially sanctioned." An individual student reading his or her Bible in study hall, without direction to do so from the teacher or a school official, is not encompassed in the terms of the injunction. Nor, by the plain terms of the injunction, is a school official proscribed from instructing a student in, *e.g.*, a Bible as Literature class to do his or her homework, including assigned reading from the Bible. Finally, of course, the entire injunction must be read in context, not dissected to fit the Attorney General's purposes in one narrow phrase. Section 6(d) makes it clear that the Court does not contemplate enjoining the student sitting in study hall; it expressly refers to a "speaker/presenter." A "speaker/presenter" is not a student quietly reading the Bible in study hall, as common sense informs us.

scope of its prohibition.[34] What is "school organized" or "officially sanctioned" religious activity? According to the Court:

> [W]hen a student advocates his or her religious beliefs in situations where the student's peers are unable to move about freely (and thereby avoid listening to speech they find disagreeable) and/or when the student's peers are unable to freely express themselves in response (because school officials are actively controlling a particular setting).[35]
>
> The Court would distinguish the above-described situations from those periods during which students are "in school" or attending a school-event but school officials exercise minimal supervisory control and students are free to move about as they please. During these latter times, *e.g.*, in between classes or lunch (depending on the factual circumstances) the restrictions on students' free speech rights are limited; students should be able to engage in sectarian, proselytizing, religious speech as long as it is not, for

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[32] In fact, the Court even emphasized, through the use of italics, that the phrase "religious activity" is to be modified by the phrases "school organized" and "officially sanctioned." (Injunction at 3.)

[33] Self-evidently, a student privately reading a Bible in study hall does not necessitate a "response" from anyone.

reasons other than its content, disruptive (*e.g.*, it is loud, the speaker is aggressive etc.).

And, the Court clarified, "As long as students abide by a school's generally applicable rules and regulations, students should ordinarily" be permitted to engage in a wide variety of religious expression. The Court went on to provide an "exemplary" list only, one that was "by no means intended to be a complete statement of permssible [sic] religious expression by public school students." (Mem. Op. at 22-23 & nn. 16, 17.)

When the speaking student's use of the school's facilities includes commandeering a captive audience or a school setting in which the speaker's schoolmates are unable to respond in kind, speech is "officially sanctioned" because the speaker is then using the machinery of the state for conveying the religious message to the captive audience. Thus, a student who obtains the permission of the school official who is monitoring the study hall and then leads his fellow study hall participants in a public Bible reading and prayer from which the dissenting students could not leave is on different constitutional ground than a student who whiles away the hour by silently reading Proverbs, instead of *Sassy* magazine, after completing his or her math assignment. The latter is engaging in that type of private religious activity which falls outside the reach of the Establishment Clause, while

the former is not. The latter's conduct is not touched by the injunction, while the former's is prohibited.

This portion of the injunction is in keeping with the requirements of the First Amendment. Public school officials are prohibited by the Establishment Clause of the First Amendment to the United States Constitution from authorizing *anyone* --including students--to insert religious exercises into a *school* program. *Lee v. Weisman,* 505 U.S. 577, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992); *Abington School District v. Schempp,* 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963); *Jager v. Douglas County Board of Education,* 862 F.2d 824 (11th Cir.), *cert. denied,* 490 U.S. 1090, 109 S. Ct. 2431, 104 L. Ed. 2d 988 (1989); *Karen B. v. Treen,* 653 F.2d 897 (5th Cir.1981), *aff'd per curiam,* 455 U.S. 913, 102 S. Ct. 1267, 71 L. Ed. 2d 455 (1982). This law is nothing new, and it militates against granting a stay.

2. Students *are* permitted to discuss the meaning of Christmas and Easter

As already noted, the Court's order reaches only "school organized" or "school sponsored" religious activity, so a student's discussions with his or her friends over lunch or on the playground are not affected in any way by the injunction. As for in-classroom activity, the Court has made provision for those students who might wish to give a speech or

presentation that includes their personal religious beliefs, including the meaning of Christmas. In paragraph 6(a), the Court states: "This PERMANENT INJUNCTION DOES NOT proscribe students' voluntary expression of their own religious beliefs in the form of homework or artwork or other school assignments as applicable...." (Injunction at 4 (emphasis in original).) This certainly includes a discussion of "What Christmas means to me" or "The true meaning of Easter" offered in connection with a school assignment (such as an essay or a speech). A student may choose in such an academic context to proffer ideas expressive of his or her own religious beliefs, consistent with *Schempp* and with this Court's injunction.

Likewise, contrary to the Attorney General's hyperbolic fulminations, the injunction does not prohibit a history student's in-class remarks about "why Jesus contributed more than Einstein or Edison." (Mot. Partial Stay at 5.) Assuming that such a remark is an expression of religious belief,[36] such remarks

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[34] It might be or it might not be. It is certainly possible that a student could believe that Jesus Christ is an important historical figure without believing that he is the Son of God, and presumably a great many Jewish believers, Muslims, Buddhists and agnostics could believe this. It could be, for example, that a Muslim student or even an atheist student could believe that Jesus was a great teacher without believing in or expressing a belief in

clearly fall within the above-articulated exception--the "voluntary expression of [students'] own religious beliefs in the form of ... school assignments." (Injunction at 4.)[37] If a teacher directs students to discuss the importance of various historical figures, a student's voluntary discussion of the importance of Jesus fulfills the terms of the assignment. This does not violate the terms of the injunction, does not violate the Constitution, and is not a reason to grant the motion to stay.

3. Students *can* pray before lunch

The injunction does not reach private expressions of a

Jesus' divinity. It could be that a person of any religion or no religion could forcibly argue in the context of an academic assignment that measuring a calendar from the date of a crucifixion is *prima facie* evidence that the historical importance of Jesus outweighs that of the inventor of incandescent lighting. This speech would not necessarily be religious, and even if it were, it is not proscribed. The matter is neither here nor there, except to the extent it is in the Attorney General's head and his brief.

[35] Also, to the extent that "educational texts" were involved in this hypothetical history class, those texts can be specifically religious, as long as the books or documents are part of an objective or academic course of study. (Injunction at 3.) *See Schempp*, 374 U.S. at 225 ("It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as a part of a secular program of education, may not be effected consistently with the First Amendment.").

student's faith, such as saying grace before meals. One particular pre-lunch "religious" behavior is prohibited: the "religiously based" harassment of Plaintiff Jesse Chandler by his fellow students at Fyffe School. (Injunction at 11.) According to the uncontroverted testimony of Michael Chandler in this case:

Fyffe School students are led to lunch every day and cannot leave the campus for lunch; the school has a closed-campus policy. In approximately October 1996, Jesse[38] began experiencing harassment in the lunchroom. I am aware that the agreement signed by my lawyer and DeKalb's lawyers states that school officials will intercede to stop harassment based on religious belief. Virtually every day between October 1996 and April 1997, approximately 175 out of 200 students in the lunchroom stood up and prayed aloud when Jesse entered the lunchroom. On one or more occasions, a student would announce on Jesse's arrival, 'One, two, three, pray.' I discussed this situation about two weeks after it started happening with principal Danny Ashley, who admitted to me that this was occurring in systematic fashion.

I also complained to Superintendent Parrish. Both Ashley and Parrish told me that lunch time was

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[36] Jesse Chandler, the minor-child plaintiff and son of Michael Chandler.

noninstructional and students could do whatever they want. I do not challenge the right of small groups of students or individual students to pray nondisruptively at lunchtime. However, a mass, audible prayer offered specifically because my son has entered the lunchroom is in my view harassment that school officials should intercede to stop, particularly in view of the captive-audience problem. DeKalb County agreed that its school officials would intercede to stop harassment based on religion and has not done so despite my requests and the requests of my counsel.

... I do not want my son harassed every day in this way and for school officials to shirk their duty to stop the harassment. The students' behavior has been organized and vindictive. In April, I told Jesse to take his lunch to my wife Barbara Chandler's classroom and to eat his lunch there to escape the harassment. I did so around the time that Jesse told me that the students were going to offer a Bible reading at lunch because they had heard I was going to be on campus that day. Technically, what I told my son to do is a violation of school policy, because he is supposed to be in the lunchroom during the lunch period. However, I felt that I must do something to prevent his being further stigmatized based on this lawsuit.

(Supp. Op. and Order at 21-22.). The Defendants, including Defendant Weldon Parrish, and DeKalb

County official Danny Ashley, did not submit contrary testimony.

Moreover, this Court specifically stated that students at lunchtime, depending on the factual circumstances, "should be able to engage in sectarian, proselytizing, religious speech as long as it is not, for reasons other than content, disruptive (e.g., it is loud, the speaker is aggressive, etc.)." (Mem. Op. at 22 n.16.) 175 students ganging up on Jesse Chandler, if this is in fact "sectarian, proselytizing, religious speech," is also disruptive and aggressive. This Court's proscription of that specific conduct does not extend to banning a student's saying of grace generally.

4. Students *can* distribute flyers about "youth group" activities to their fellow students

As is made absolutely clear in the injunction, students are NOT prohibited from "distributing religious materials to classmates during noninstructional time, subject to the same time, place, and manner restrictions imposed on student distributions of nonreligious materials ..." (Inj. at 4, 11.) In keeping with the policy of neutrality, students' distributions of tracts or invitations to church events are treated exactly like the distributions of non-religious materials and are subject to the school's time, place and manner restrictions. The First Amendment does not require anything more. This false objection is not a reason to grant the

Attorney General's motion to stay.

5. A valedictorian *is not* prohibited from explaining the importance of Mother Teresa to her success in school

In the hypothetical offered by the Attorney General, a class valedictorian could not explain the importance to her of Mother Teresa in her speech to the graduating class. (Mot. Partial Stay at 2.) The Attorney General complains that such a speech might be deemed a "devotional" and that school officials would be obligated to censor her speech before she gave it in order to prevent an infraction of the terms of the injunction.

The Attorney General has made a profound analytical error. Just as he assumes that all discussion or reference to Jesus is necessarily religious or proselytizing speech, he assumes that any discussion of Mother Teresa, merely because she is a religious figure, would be religious or have the purpose or effect of proselytizing. It is possible that, just as Jewish believers, Muslims and agnostics could believe that Jesus has been a shaping force in history without believing that he is the Son of God, persons could believe that Mother Teresa was a great helper of the poor without subscribing to her religious faith or religious example. Thus, speech about Mother Teresa is not necessarily religious speech.

Such a speech as the Attorney General contemplates is

not a "devotional." The court's injunction is not issued in a vacuum; it is issued in the factual context of DeKalb County. In DeKalb County, devotionals were expressly delivered over the public-address system, as all of the affidavits from employees at the Plainview School establish. They included Bible reading and prayers, and the DeKalb County affiants testified that the messages over the intercom were of "a devotional character, ... but not religious" even while admitting that they included Bible readings and prayer. (*See* Mem. Op. and Order, Nov. 12, 1997, at 10-12 (granting summary judgment to plaintiffs against DeKalb County on nonfacial challenges).) The Court made plain that it took a devotional to be religious. (*Id.* at 11.) The Court's injunction clearly contemplates that a devotional may is [sic] religious: "vocal prayer; Bible and religious devotional or scriptural readings" are proscribed by Section 6(a); prayer and "religious or devotional messages (including scriptural readings)" over the public-address system are proscribed by section 6(c); "Biblical and scriptural readings" at school-sponsored assemblies and events except where consistent with the Equal Access Act, are proscribed by Section 6(d). The Attorney General may not pry one nubbin from the Court's injunction and pretend that it stands alone, without the context of the rest of the injunction and the

factual context in which the injunction was rendered. From a 40-page opinion on the facial validity of the statute in March 1997, over 50 pages of findings of fact and conclusions of law on November 12, 1997, a 24-page summary judgment opinion on November 12, 1997 which the Court stated was to be read concurrently with the findings of fact[39] –DeKalb County ought to know what is proscribed. *It does not matter if the other defendants who are not specifically enjoined as to DeKalb County practices understand the injunction or not.* An entire valediction on Mother Teresa is not proscribed; a prayer is. It is unimportant that the Attorney General purports not to know what a devotional is; it matters only that DeKalb County, which is bound by the provisions of the injunction,[40] knows what a devotional is. In this case, devotionals have, by all the facts, consisted of prayer and Bible reading. Nowhere in the Complaint is Mother Teresa mentioned, nor have the DeKalb County defendants purported to offer testimony about Mother Teresa. Instead, as the Court noted in its November 12, 1997 summary judgment opinion, the DeKalb County defendants sought refuge as to their

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[37] *See* Supp.Op. and Order, Nov. 12, 1997 n. 53.

[38] [Not adopted].

"devotionals" and "words of inspiration"--which by their own affidavits turn out to be Bible readings and prayer over the intercom--in the statute's protection, themselves denominating such devotionals "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." (*See* Mem.Op., Nov. 12, 1997 at 10-11.)

Noting that the DeKalb County defendants had equated "words of inspiration" with "devotionals" in response to an interrogatory inquiring about a Bible reading at a D.A.R.E. assembly, and averring that the activity was alleged to be 'non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions' *by DeKalb County*, the Court expressly stated: "The court finds it reasonable to conclude that mere 'words of inspiration' would not require the invocation of the Alabama school-prayer statute and that DeKalb conflated such a category of inspirational words into the category of devotions in hopes of thereby insulating them from scrutiny." *The specific invocation of the statute would not be necessary for secular 'words of inspiration'....* (Mem. Op., Nov. 12, 1997, at 11.) (Emphasis added.) In other words, *secular words of inspiration--as distinct from prayers and Bible readings* --are not prohibited by anything in the Court's injunction or in its opinions. *Secular presentations, including*

presentations drawing upon the examples of adults who have led righteous lives, are absolutely permissible.[41]

Other federal courts agree with this court about what is proscribed activity, equating "devotional" with "prayer" and/or "Bible reading." *See Schempp*, 374 U.S. at 207 (student-chosen Bible readings followed by Lord's Prayer); *Wallace v. Jaffree*, at 42 (noting complaint's equivalence of "devotional" activities with "saying prayers in unison"); *Dayton Christian Schools, Inc. v. Ohio Civil Rights Comm'n*, 766 F.2d 932, 937 (6th Cir.1985) ("devotional thought" is "something fresh to me from the Scriptures"); *EEOC*

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[39] A "devotional" camouflaged by an "inspirational" patina is clearly what the Court had in mind, *with reference to the facts in DeKalb County, which it exhaustively detailed,* when it referred in Section 6(a) to discussions of a devotional/inspirational nature in "the classroom and in instructional settings," as distinct from graduation. It did not repeat this phrase with regard to graduation prayer. Why? Because the facts before the Court did not disclose with regard to graduation prayer, as they did with regard to prayer and devotionals over the intercom system during the instructional day, that "words of inspiration" were actually Bible readings or prayers. Thus, the Court has no reason, in regard to graduation, to say anything other than what it implicitly said in its November 12, 1997 summary judgment opinion: that secular words of inspiration are permissible in that context. At graduation, the evidence being what it was, DeKalb County is enjoined from offering devotional messages, not from offering any secular inspirational message.

v. Townley Engineering & Manufacturing Co., 859 F.2d 610, 612 (9th Cir.1988) (devotional services included "prayer, thanks to God, testimony and scripture reading"); *Bell v. Little Axe Sch. Dist.*, 766 F.2d 1391, 1397 n. 2 (10th Cir.1985) (devotional exercises also called "fellowship, prayer sessions, prayer meetings, religious sessions, religious meetings, 'sharing sessions,' and 'Prayer Service/Activity' "); *Doe v. Stegall*, 653 F.2d 180 (5th Cir. Unit A 1981) (devotional activities were "poetry, Bible verses and prayers of a Protestant cast"); *Meltzer v. Board of Pub. Instr.*, 548 F.2d 559, 573 (5th Cir.1977) (en banc), *cert. denied*, 439 U.S. 1089, 99 S. Ct. 872, 59 L. Ed. 2d 56 (1979) (devotionals consisted of "prayer and Bible reading"); *Alabama Civil Liberties Union v. Wallace*, 331 F. Supp. 966, 969 (M.D. Ala.1971) (Judge Varner finding that Bible readings are devotionals), *aff'd per curiam*, 456 F.2d 1069 (5th Cir.1972); *Herdahl v. Pontotoc County School Dist.*, 933 F. Supp. 582, 585 (N.D.Miss.1996) (devotionals were short inspirational messages often including Bible reading, frequently followed by a prayer).

This case was not litigated in the dark for going on two years. The record in this case reveals what a devotional is, and in this case, devotionals look a lot like the unconstitutional activity in the above-cited cases, especially *Herdahl*. Devotionals are religious,

not secular words of inspiration. DeKalb County can understand this.

The Attorney General apparently is confused by the Court's specific reference to using a "Historian's Address" as a ruse for graduation prayer--which the evidence in this case shows occurred--and has appended a prayer in the guise of a class "Historian's Address" that actually occurred to his general speculation about references to history or historical figures that have not occurred. This is not a reasonable reading, and it disregards the record.

This is the mataphorical [sic] apples and oranges dumped out of the cart into reason's path, hoping to trip it. It is clear from the Court's injunction that offering speech about historical figures, including religious ones, is permissible, and it is not permissible to offer *prayer* in the guise of a "Historian Address," as Sylvania High School did in 1996 and 1997 while this lawsuit was pending, the 1997 prayer occurring after plaintiffs' counsel had expressed objection to DeKalb County counsel. It is to this pointed "Historian Address" experience, not to Mother Teresa, that a particular provision for this contingency is made in the Court's injunction.

In short, the issue is not, as the Attorney General argues, whether students have free speech rights to expound on the topic of their choice in a graduation

speech. The issue is whether school officials have authorized someone--anyone, student or not[42]--to insert religious exercises into the school's graduation program.

This Court, like other federal courts before it, apprehends a "devotional" to be susceptible of its common meaning.[43] Its findings of fact and summary judgment opinion bear this out:

[I]n Interrogatory Number 11, the Plaintiffs ask: "In paragraph 50 of the DeKalb defendants' Response to Plaintiffs' Statement of Stipulated Facts, the defendants state, 'Defendants admit that student-led devotionals have taken place at Plainview School.' Do the DeKalb defendants contend in this lawsuit that such prayers

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[40] Including Muhammad Ali. (Mot. Partial Stay at 2.)

[41] *See Random House College Dictionary* (rev. ed.1982). A "devotion" is defined as: "1. profound dedication; consecration. 2. earnest attachment to any purpose, cause, etc. 3. an assignment or appropriation to any purpose, cause, etc. 4. *Theol.*, the ready will to serve God. 5. Often, *devotions. Eccles.* religious observance or worship; a form of prayer or worship for special use." A "devotional" is defined as: "1. characterized by devotion; used in devotions. 2. Often, *devotionals.* a short religious service, esp. as part of a meeting, convocation, or the like." Any commonsense reading of the injunction here, informed by the evidence in this case, will indicate exactly what is meant by "devotions" and "devotionals." We are not talking about setting aside land or materials or an earnest attachment to the school principal.

offered by student 'volunteers' are 'non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions'?" DeKalb responded, "Yes."

Since all of the parties, as well as the Court, appear to be of the opinion that a 'devotional' is a religious exercise, that falls within the category of 'prayer, invocations and/or benedictions,' and the Court finds that for the same reasons it has found that under established United States Supreme Court precedent that vocal prayers led by students in the classroom are unconstitutional, student-led 'devotionals' are similarly unconstitutional. (Supp. Op. at 58 & n. 52) (*citing Engel, Schempp,* and *Lee*).

6. School officials *are not* required to be censors or to be clairvoyant at commencement or at student assemblies and events

The injunction contemplates that there will be no prayer, benediction, invocation or devotional at commencement exercises. The injunction contemplates that no student will offer one. *See* Section 6(b). However, the injunction does not contemplate censorship by school officials; if it did, it would not call for school officials to take appropriate disciplinary action as they would for any violation of school disciplinary rules that is calculated to cause cessation of the conduct *as it occurs* and deterrence of

such conduct in the future.

The same is true of student assemblies and sporting events. The injunction contemplates that there will be no prayer, scriptural readings, or devotional messages over the public-address system during the school day or at school-sponsored assemblies or events. However, the injunction does not contemplate censorship or prior restraint by school officials; if it did, it would not call for school officials to take appropriate disciplinary action as they would for any violation of school disciplinary rules that is calculated to cause cessation of the conduct as it occurs and deterrence of such conduct in the future.

This argument is simply a shibboleth. It is clear what the Court meant to prohibit, and it is clear that school officials--who have sat through a great many prayers in DeKalb County classrooms, as well as at football games, assemblies, and commencement exercises--know prayer when they see it.

7. A parent *can* pray for an injured player while the parent is seated in the stands

The Plaintiffs have looked in vain for a portion of the injunction that would prohibit such prayers, as the Attorney General alleges. It is difficult to see how a parent who prays while seated in the stands, whether out loud or silently, would ever fall within the category of prohibited "school organized" or "officially

sanctioned" prayers over the public address system at sporting events. (Injunction at 6-7). [sic] It is also difficult to see how a school official could either prevent or permit a parent from praying in the stands and so run afoul of the injunction.

The Attorney General's similar ... claim that a student cannot bow his head in prayer after scoring the winning touchdown is likewise not the reading of a reasonable person. Although Section 6(d) does not expressly provide that he can, Section 6(c) is the provision that is applicable to prayer over the public-address system at high school football games. The Attorney General's hypothetical does not feature the football player seizing the public-address system and commandeering the audience, which would be proscribed under Section 6(c).[44] These examples indicate the way in which the Attorney General has seized on one little snippet of the injunction in order to sound the alarm bell without reading particular provisions in context or with regard to the facts or the totality of circumstances.

8. Student Bible Clubs *can* meet on the same terms as other student clubs

According to the Attorney General, the injunction would prohibit a student-initiated Bible Club from

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[42] [Not adopted].

meeting on campus, even after school hours, and would prohibit students from publicizing the times and locations of such meetings. (Mot. Part. Stay at 6-8.) only through a tortured reading of the injunction could one arrive at such a conclusion, and the law does not require courts or parties to twist themselves into knots trying to find an unconstitutional meaning in an otherwise plain directive.

The provision of the injunction which the Attorney General finds offensive reads:

This PERMANENT INJUNCTION DOES NOT affect the rights of secondary-school students to engage in religious activity during noninstructional time that is consistent with the federal Equal Access Act, 20 U.S.C. § 4071 *et seq.*, or to quietly engage in religious activity during noninstructional times, so long as it does not unduly call attention thereto and so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its imposition upon themselves. This PERMANENT INJUNCTION DOES NOT prohibit students from distributing religious material to classmates during noninstructional time, subject to the same time, place and manner restrictions imposed on student distributions of nonreligious materials.... (Inj. at 4.) Manifestly, the injunction "does not affect the rights of secondary-school students to engage in religious activity during

noninstructional time that is consistent with the federal Equal Access Act." (Inj. at 4.) The religious activity permitted by the federal Equal Access Act--the use of school facilities by student-initiated noncurricular Bible clubs on the same basis as other noncurricular clubs--is expressly protected. *See Westside Comm. Schl. v. Mergens*, 496 U.S. 226, 110 S. Ct. 2356, 110 L. Ed. 2d 191 (1990). The injunction also allows "students" (and there is nothing in the injunction which excludes members of the Bible Club from the general category of "students") to distribute "religious materials" to their classmates, on the same terms that nonreligious materials are distributed. Later, the Court clarified the rights of student Bible club members to have access to the public address system to publicize their meetings:

> This PERMANENT INJUNCTION DOES NOT prohibit students from making announcements over the school public-address system regarding meetings of noncurricular religious clubs, ... provided that any such announcements are subject to the same time, place and manner restrictions that apply to announcement of nonreligious activities. (Injunction at 7.)

As acknowledged by the Attorney General, this is precisely what federal law requires. (*See* Mot. Partial Stay at 8 ("official recognition allows student clubs to be part of the student program and carries with it access to the school newspapers, bulletin boards, the

public address system and the annual Club Fair") (*quoting Mergens*).) The combination of the two clauses should solve the Attorney General's problem with the injunction and end disputes about the rights of Bible Club members. The plaintiffs do not see how the Court could have been less vague or more narrow. Still, the Attorney General insists that the injunction is overbroad because it makes it clear that in addition to these other rights, students may also "quietly engage in religious activity during noninstructional times, so long as it does not unduly call attention thereto and so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its imposition upon themselves."[45] (Injunction at 4.) A reasonable person would not glean from the injunction that this additional right to pursue the religious activities of the student's choice during noninstructional times interferes with the student's separate, Equal Access Act-guaranteed right to participate in a religious club on the same basis as he might in nonreligious clubs.

(*See* Pls.' Opp'n at 10-32.)

II. Conclusion

Based on the foregoing, the court finds that those enjoined

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[43] The Court used the word "or," to indicate another item in the list of protected student activities.

understand their obligations and responsibilities under the Permanent Injunction. **It is also clear that contrary to the Attorney General's strained hypotheticals, the Permanent Injunction does nothing to limit individual exercise of personal religious beliefs. The court has answered most, if not all of the Attorney General's proffered hypotheticals *in favor of the activity the Attorney General claims is prohibited.* As articulated throughout this Order, the activities the Attorney General claims are prohibited, simply put, *are not.***

Those attempting good-faith compliance with the court's Orders need not fear contempt citations. However, the court expects compliance with its Permanent Injunction unless and until it is further clarified by the Eleventh Circuit Court of Appeals or the United States Supreme Court. Counsel, in particular, are directed to make every effort to explain to their clients, in building block fashion if necessary, the exact nature and scope of the Permanent Injunction, and to endeavor to quell misunderstandings or misrepresentations, whether genuine or feigned, the latter of which appear to be running rampant.[46]

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[44] The court notes the December 8, 1997 issuance of a memorandum by the Attorney General and the State Superintendent of Education regarding "Permissible Activities in the light of *Chandler v. James.*" The court commends any *good-faith* effort to "clear up any misunderstandings" and "provide assistance to public school administrators and teachers." (*See* December 8, 1997 Mem., Attach. C; *see also,* Pls.' Add. Evid.) This memorandum was issued in conjunction with the Attorney General's December 8, 1997 Press Release. (*See* AG December 8, 1997 Press Release,

The political posturing that has followed this case encourages divisiveness and apprehension, benefits neither the citizens nor the school-children of Alabama, and clouds the real issues raised by this suit: the coercive religious practices engaged in or allowed by state officials in DeKalb County. In conformance with long established precedent, which this court is bound to follow and which the Attorney General now appears to recognize as controlling, the Permanent Injunction simply proscribes state-established religion and endeavors to ensure the state's neutrality in matters of religion in the public schools. An informed understanding of the Permanent Injunction discloses nothing more.

Attach. B; *see also,* Pls.' Add. Evid.) Both documents attempt to articulate guidelines regarding permissible and impermissible conduct. Because the question of the propriety of the Attorney General and Superintendent's guidelines is not before the court, the court will not examine the issued guidelines in light of any of its previous Orders at this time.

Interestingly, however, although the Attorney General purports to have derived these guidelines exclusively from "previous opinions issued by the U.S. Supreme Court and the Eleventh Circuit Court of Appeals, rather than the *Chandler* ruling in October by a U.S. District Court in Montgomery," (AG December 8, 1997 Press Release at 1; *see also* Pls.' Add. Evid.), the guidelines track this court's Permanent Injunction and March and November 1997 Orders, as well as the cases relied on by this court in issuing those Orders. It is indeed odd that the Attorney General now cites those cases for support when they were conveniently ignored prior to the court's March 1997 Memorandum Opinion and Order. Nevertheless, the court commends any truthful dissemination of information regarding the issue of religion in the public schools.

ORDER

Based on the foregoing, it is CONSIDERED and ORDERED that Defendants' Motion For Partial Stay Of Permanent Injunction be and the same is hereby GRANTED IN PART and DENIED IN PART. Defendants' Motion is GRANTED as to the twelve words in section 6(a) of the court's three-thousand, seven-hundred and fourteen word Permanent Injunction reading "quietly" and "so long as it does not unduly call attention thereto and."[47] (*See* Permanent Inj. at 4, lines 14-16.) Otherwise, Defendants' Motion For Partial Stay Of Permanent Injunction is DENIED. All other provisions of the October 29, 1997 Permanent Injunction shall remain in full force and effect absent modification by the Eleventh Circuit Court of

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[45] Paragraph 5 of section 6(a) of the Permanent Injunction, with those portions stayed, should read:

> This PERMANENT INJUNCTION DOES NOT affect the rights of secondary-school students to engage in religious activity during noninstructional time that is consistent with the federal Equal Access Act, 20 U.S.C. Section 4071, *et seq.*, or to ... engage in religious activity during noninstructional times, ... *so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its imposition upon themselves.* This PERMANENT INJUNCTION DOES NOT prohibit students from distributing religious materials to classmates during noninstructional time, subject to the same time, place, and manner restrictions imposed on student distributions of nonreligious materials, subject to the provisions of paragraph 6(e) below.

Appeals or the United States Supreme Court. The Parties are DIRECTED to fully comply with the terms of the Permanent Injunction, absent the portion of section 6(a) STAYED above, as applicable.

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

MICHAEL CHANDLER, et al.,

Plaintiffs,

v. **CIVIL ACTION NO. 96-D-169-N**

FORREST H."FOB" JAMES JR., et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

In 1977, the Alabama legislature passed the first in a series of "school prayer" statutes. This first statute, which provided for a moment of silence at the beginning of the school day, *see Ala. Code* § 16-1-20 (1995), was supplemented in 1981 by a statute which specifically provided that the moment of silence "shall be observed for meditation or voluntary prayer." *Ala. Code* § 16-1-20.1 (1995). Then, in 1982, a third school prayer statute was passed which "recogniz[ed] that the Lord God is one" and permitted public school teachers to lead willing students in a specified prayer. *Ala. Code* § 16-1-20.2 (1995). Both the 1981 and 1982 statutes were struck down because they

violated the Establishment Clause of the First Amendment to the United States Constitution. *See Jaffree v. Wallace*, 705 F.2d 1526, 1535-36 (11th Cir. 1983), *aff'd*, 472 U.S. 38 (1985) (section 16-1-20.1); *Jaffree v. Wallace*, 705 F.2d 1526, 1535-36 (11th Cir. 1983), *aff'd*, 466 U.S. 924 (1984) (section 16-1-20.2).

In 1993 the Alabama Legislature enacted a fourth statute. The operative portion of § 16-1-20.3 reads:

> (b) On public school, other public, or other property, non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benedictions, shall be permitted during compulsory or non-compulsory school-related student assemblies, school-related student sporting events, school-related graduation or commencement ceremonies, and other school-related student events.

Ala. Code § 16-1-20.3(b) (1995). In 1996, the plaintiffs filed this suit asserting, among other things, that § 16-1-20.3 is facially unconstitutional. Thus, the Court must decide whether this latest school prayer statute has been cured of the infirmities that rendered its predecessors unconstitutional.

To begin, the Court will review the landscape of Establishment Clause jurisprudence as it relates to public schools in order to provide a context for the Court's discussion of the statute at issue. Religion has been, and continues to be, an important part of many Americans' public and private lives. *See School Dist. Of Abington Township, Pennsylvania v. Schempp*,

374 U.S. 203, 212-13 (1963); *Engel v. Vitale*, 370 U.S. 421, 433-35 (1962); *Zorach v. Clausen*, 343 U.S. 306, 313 (1952). The pervasiveness of religion in this country is apparent from its frequent manifestation in public life -- from prayers marking the opening of Congress and many state legislatures, *see Marsh v. Chambers*, 463 U.S. 783 (1983), to the affirmation found on our legal currency, to the oaths of office taken by many of our publicly elected officials. *See Schempp*, 374 U.S. at 213 (noting various examples of religious affirmations in public life); *see also* E. Gregory Wallace, *When Government Speaks Religiously*, 21 Fla. St. L. Rev. 1183, 1183-1185 (1994) (same).

It was devout religious conviction which led many colonists to leave England and settle in America. Unwilling to suffer the state-sponsored Church of England, many settlers came to this country in search of the right to freely exercise their religious beliefs -- to be free from state-established religion. *See Engel*, 370 U.S. at 434. Eventually, these rights were memorialized in the First Amendment to the Constitution: "Congress shall make no law respecting an establishment of religion," (the Establishment Clause) "or prohibiting the free exercise thereof" (the Free Exercise Clause). U.S. Const. amend. I.[1]

The right to be free from state-established religion lies at

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[1] The Court is keenly aware that the First Amendment directs that "**Congress** shall make no law. . ." U.S. Const. amend. I (emphasis added). However, the Supreme Court has held that the guarantees of the First Amendment, through the Fourteenth Amendment, are equally applicable as against the states. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

the heart of the concept of "freedom of religion." *See Lee v. Weisman*, 505 U.S. 577, 591 (1992) ("the Framers deemed religious establishment antithetical to the freedom of all"). It has been said that nothing short of a "wall of separation between church and state" can adequately safeguard our religious freedom. *See Everson v. Board of Educ. of Ewing*, 330 U.S. 1, 16-18 (1947). While this wall may be more metaphor than mortar, *see Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) ("far from being a 'wall,' [the Establishment Clause] is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship"), the concept continues to be a useful one as the separation of church and state is fundamental to the preservation of our pluralistic society.

The framers codified at least two purposes when they enacted the Establishment Clause. "Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion." *See Engel*, 370 U.S. at 431. Although frequently touted as a telic tool used by religious dissenters, the Establishment Clause is properly seen as an essential safeguard for the sanctity of religious belief. James Madison acknowledged this when he stated, "'[E)xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation.'" *Lee v. Weisman*, 505 U.S. 577, 590 (1992) (quoting James Madison's *Memorial and Remonstrance Against Religious Assessments* (1785), in 8 *Papers of James Madison*, 301 (W. Rachal et al. eds. 1973)). While government support of religion may, for the benefitted

believer, have an initial appeal, this support ultimately leads to governmental influence and a concomitant erosion of religious tenets. For this reason, "[i] t is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government." *Schempp*, 374 U.S. at 259 (Brennan, J., concurring).

Second, by enacting the Establishment Clause, the framers sought to prevent the political persecution of those people of a minority faith. *See Engel*, 370 U.S. at 431. Religious faith can be a powerfully divisive force. *See Sch. District of Grand Rapids v Ball*, 473 U.S. 373, 382 (1985) ("[J]ust as religion has provided spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions or sects that have from time to time achieved dominance."). While our political system is founded on majoritarian principles, freedom of religious belief was deemed too important to be subject to the whim of the majority. *See Schempp*, 374 U.S. at 226 (a majority cannot "use the machinery of the state to practice its [religious] beliefs"); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."). The Establishment Clause prevents one's religious beliefs from

being made relevant to one's standing in the political community. *See Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J. concurring).

The Establishment Clause works together with the Free Exercise Clause to protect our religious freedom. As discussed above, the Establishment Clause prevents the majority from legislating preferential treatment for those of a particular religious faith. In turn, the Free Exercise clause insures that government will not unduly burden the practice of any religious faith. *See e.g Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U. S. 520, 532 (1993); *Braunfield v. Brown*, 366 U.S. 599 (1961) ("If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid."). Together, "[t]he First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the state." *Lee*, 505 U.S. at 589.

Although the Establishment Clause works with the Free Exercise Clause to fully safeguard our religious freedom, there is an inherent tension between the two clauses. *See Walz v. Tax Comm'n*, 397 U.S. 664, 668-69 (1970). If the Free Exercise Clause were interpreted as an absolute mandate, it would subsume the Establishment Clause. *Id.* Paradoxically, making "Free Exercise" an absolute mandate would, for all the reasons discussed above, effectively destroy "freedom of religion" as we know it.

The Free Exercise Clause does, however, contain an

absolute component: freedom of belief. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The government can never take action which has the effect of proscribing or prescribing a belief. Thus, in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, the Supreme Court declared unconstitutional a resolution which required students to salute and "pledge allegiance" to the flag of the United States or face expulsion and other punitive measures.[2] The Court stated, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

Although the Free Exercise Clause guarantees complete freedom of belief, the guarantee does not extend to protect all religious activity. *Cantwell*, 310 U.S. at 303-04 ("[T]he [First] Amendment embraces two concepts, -- freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."). If the Free Exercise Clause protected all religious activity, it would not be possible to maintain a civil, pluralistic society. To take an obvious example, consider a religion which required adherents to make human sacrifices; while the Free Exercise Clause protects the right to ascribe to such a faith, it would not protect believers who acted in accordance with such tenets. *See Employment Div. Dept. of*

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[2]The Court's decision in *Barnette* did not rest solely on the appellant's assertion of Free Exercise rights, but turned on principles guiding the First Amendment as a whole.

Human Resources v. Smith, 494 U.S. 872, 882-90 (1990). Similarly, it is easy to see how the absolute protection of religious activity would quickly lead to an establishment of religion. If a school principal's religious beliefs commanded him or her to "save" others and taught him or her that other religions were false, he or she might consider it his or her religious duty to "establish" his or her religion in that particular school.[3] And, if the Free Exercise Clause were an absolute, the principal would have a constitutional right to press his or her religious views on students through official school channels. Clearly, the Free Exercise Clause cannot be interpreted as an absolute mandate.

What then do these complementary, yet competing, clauses (Establishment and Free Exercise) require? They require government to remain strictly neutral both among religions and between religion and non-religion. *County of Allegheny*, 492 U.S. at 590-91; *Ball*, 473 U.S. at 381-82; *Jaffree*, 472 U.S. at 60; *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968); *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824, 828 (11th Cir. 1989), *cert. denied*, 490 U.S. 1090 (1989). It is the job of the judiciary to insure that governments do not run afoul of this

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[3] While the Court uses this example merely to illustrate its point, this hypothetical principle could very well exist in reality. In the words of the late Mr. Justice Jackson, "in our country are evangelists and zealots of many different political, economic and religious persuasions whose fanatical conviction is that all thought is divinely classified into two kinds–that which is their own and that which is false and dangerous." *American Communication Assn. v. Douds*, 339 U.S. 382, 438 (1950) (Jackson, J. concurring in part and dissenting in part).

command of neutrality – to insure that government takes no action which favors or disfavors religion or religious belief. *See County of Allegheny*, 492 U.S. at 592-93; *Barnette*, 319 U.S. at 638.

Courts must perform this task with added vigilance when governments take action affecting our public schools. "Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987). School children are particularly susceptible to peer pressure and other forms of direct or indirect coercion. *See Ball*, 473 U.S. at 383 ("the government's activities in [public schools] can have a magnified impact on impressionable young minds"). Furthermore, school attendance is mandatory, and while in school, students' expressive behavior is strictly regulated. When prayer is introduced into a public school curriculum, students who find the particular prayer, or prayer in general, offensive cannot express their dissent by "walking away" or verbally objecting. *See Lee*, 505 U.S. at 592-94; *Edwards*, 482 U.S. at 584; *c.f. Marsh*, 463 U.S. at 792 (allowing prayer to open session of state legislature in part because those in attendance are free to enter and leave). In the sensitive setting of our public schools, "[w]hat to most believers may seem like nothing more than a reasonable request that the nonbeliever respect their religious practices [] may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce

a religious orthodoxy." *Lee* 505 U.S. at 592. Thus, what is permissible religious expression or activity in some settings, is regularly held to violate the mandate of neutrality towards religion in our public schools. *See, e.g., Doe v. Duncanville Ind. Sch. Dist.*, 70 F.3d 402, 406-07 (5th Cir. 1995) (prayer at high school basketball game unconstitutional); *Berger v. Rensselaer Central Sch. Corp.*, 982 F.2d 1160, 1170-71 (7th Cir. 1993) (distribution of Gideon's Bibles in public school unconstitutional), *cert. denied*, 508 U.S. 911 (1993); *Jager*, 862 F.2d at 830-32 (prayer at high school football games unconstitutional); *see also* Jonathon C. Drimmer, *Hear No Evil, Speak No Evil: The Duty of Public Schools to Limit Student-Proposed Graduation Prayers*, 74 Neb. L. Rev. 411, 419-20 (1995) (interpreting the principle of "neutrality" in the public school setting to "require[] an active participation by the schools to guarantee that religion remain absent from school-sponsored events").

Moreover, in the public school setting, federal courts have repeatedly struck down legislation and practices permitting prayer even when the prayer at issue was ostensibly "voluntary" or "student-initiated." For example, in *Engel v. Vitale*, the Supreme Court declared unconstitutional a school district's practice of having students recite aloud a non-denominational prayer even though students were free to elect not to participate. 370 U.S. at 423-24. The Court stated:

> The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any

> showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. ... When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect pressure upon religious minorities to conform to the prevailing officially approved religion is plain.

Id. at 430-31; *see also Lee*, 505 U.S. at 599; *Schempp*, 374 U.S. at 224-25; *Jager*, 862 F.2d at 832. Similarly, because the resources and facilities of the state are utilized when a "student-initiated" prayer is given in public schools, those hearing the prayer may be led to believe the state is associated with or endorses either the speaker's religion, or religion over non-religion. *See Ingebretson v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 279 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 388 (1996); *American Civil Liberties Union v. Black Horse Pike Regional Bd. Of Education*, 84 F.3d 1471, 1479-80 (3d Cir. 1996); *Hierdahl v. Pontotoc County Sch. Dist.*, 887 F. Supp. 902, 908 (N.D. Miss. 1995); *Gearon v. Loudon County Sch. Bd.*, 844 F. Supp. 1097, 1099 (E.D. Vir. 1993); *but see Jones v. Clear Creek Ind. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993).[4]

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[4] The defendants assert that *Jones* is the "first and leading case on this type of issue." Gov.'s and Atty. General's Resp. Br. on Constitutionality of § 16-

1-20.3. *Jones*, however, is not controlling precedent in this circuit, is of limited relevance to the instant case, and rests on questionable legal conclusions.

In *Jones*, the Fifth Circuit held that a resolution permitting high school seniors to choose student volunteers to deliver nonsectarian, nonproselytizing prayers at graduation ceremonies, was constitutional. 930 F.2d 416 (5th Cir. 1991). The Supreme Court vacated that decision in light of its decision in *Lee v. Weisman*, 505 U.S. 577 (1992). On remand, the Fifth Circuit again held the resolution was constitutional. 977 F.2d 963 (5th Cir. 1992) (Jones II). Thereafter, the Supreme Court denied certiorari. 508 U.S. 967 (1993).

The statute at issue in the instant case is far broader than a resolution permitting voluntary prayer at a high school graduation. First, § 16-1-20.3 is not limited to high schools, it appears to apply equally to all public schools from kindergarten through twelfth grade. The court in *Jones II* based its decision in part on the contention that, "graduating high school seniors would be less easily influenced by prayer than would their junior schoolmates." 977 F.2d at 967. The court went on to state that it considers "the age of the graduating seniors relevant to the determination of whether prayers under the Resolution can coerce these young people into participating in a religious exercise." *Id.* at 971. The statute at issue here applies to those "junior schoolmates," and thus, the potential coercive effect is much greater than that of the resolution at issue in *Jones II*.

Second, § 16-1-20.3 is not limited to high school graduations as was the resolution in *Jones II*. Under the terms of the statute here, students would be permitted to engage in the type of activity approved of in *Jones II* at all "compulsory or non-compulsory ... school-related student events." § 16-1-20.3(b). It is clear that the court's reasoning in *Jones II* was limited to the high school graduation context. *Id.* at 966 (holding resolution serves a secular purpose because "meaningful graduation can provide encouragement to finish school and the inspiration and self-assurance

Over the years, the Supreme Court has developed a number of principles designed to aid the courts in their task of insuring government neutrality towards and among religions. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court identified "the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious

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necessary to achieve after graduation"). Indeed, subsequent decisions from the Fifth Circuit make it clear that the holding in *Jones II* is limited to the context of a high school graduation. *See Doe v. Duncanville Ind. Sch. Dist.*, 70 F.3d 402, 406 (5th Cir. 1995) (holding unconstitutional practice which permitted basketball coach to supervise and participate in team prayers held at games and practices); *Ingebretsen v Jackson Public Sch. Dist.*, 88 F.3d 274, 279-280 (5th Cir. 1996) (holding unconstitutional a state statute which permitted student-initiated nonsectarian, nonproselytizing prayer at school-related events, but noting that statute could stand in context of high school graduation).

Finally, despite the defendants' contention, the Court notes that *Jones II* appears to be an aberrational case rather than the "leading case on this type of issue." See Alexander Tanford, *The Death of Graduation Prayer: The Parrot Sketch Redux*, 24 J.L. & Educ. 423, 426-33 (1995). With all due respect, the Court believes that the decision in *Jones II* is a departure from established Supreme Court precedent. *See Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447, 454-57 (9th Cir. 1994), *vacated as moot*, 115 S. Ct. 2604 (1995); Tanford, *supra* at 447-54. Furthermore, the decision in *Jones II* is inconsistent with controlling Eleventh Circuit precedent. *See, e.g., Jager*, 862 F.2d at 824. The Court is bound by Eleventh Circuit precedent, and therefore, the Court cannot follow the reasoning set forth in the *Jones II* decision.

activity.'" *Id.* at 612 (quoting *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970)). To determine whether a practice or legislation implicates any of these evils, the *Lemon* Court summarized the Court's Establishment Clause jurisprudence into three tests: (1) does the statute have a secular purpose[5]; (2) is the principal or primary effect of the statute to advance or inhibit religion; and (3) does the statute foster excessive entanglement with religion. *Id.* at 612-13.[6] If the answer to any of these questions is "yes," then the legislation in question has violated the principle of government neutrality towards and among religions, and is unconstitutional. *Id.* at 613-14; *Jager*, 862 F.2d at 828.

The Supreme Court has since decided a number of cases wherein they have supplemented the tripartite *Lemon* test. In her concurrence in *Lynch v. Donnelly*, 465 U.S. 668 (1984), Justice 0'Connor attempted to refine the "purpose" and "effect" prongs of the *Lemon* test. According to Justice 0'Connor, the relevant inquiry is whether the challenged government activity has either the purpose or effect of endorsing or disapproving religion. *Id.*

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[5] A "secular" purpose is one which "relat[es] to the worldly or temporal as distinguished from the spiritual or eternal." *Webster's Third New International Dictionary*, 2053 (1961).

[6] Although *Lemon* has been the subject of considerable criticism, *see, e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2149-50 (1993) (Scalia, J., concurring in judgment), it has not been overruled and is unquestionably the law in this circuit. *See, e.g., Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383, 1388 (11th Cir. 1993); *Jager*, 862 F.2d at 828.

at 688 (0'Connor, J., concurring). To make this inquiry, courts must "examin[e] ... both the subjective and objective components of the message communicated by a government action." *Id.* at 690 (O'Connor, J., concurring). Such an inquiry helps identify those governmental activities which "intentionally or unintentionally [] make religion relevant, in reality or public perception, to status in the political community." *Id.* at 692 (O'Connor, J., concurring). It is these governmental activities that the Establishment Clause intended to strictly prohibit. *Id.* at 687-88 (0'Connor, J., concurring); see generally Joel S. Jacobs, *Endorsement as "Adoptive Action:" A Suggested Definition of, and an Argument for, Justice O'Connor's Establishment Clause Test*, 22 Hastings Const. L.Q. 29 (1994). While Justice 0'Connor's revision of the *Lemon* test was not adopted by the entire Court, it has frequently proven useful in the Court's analysis of religion cases. *See, e.g., County of Allegheny*, 492 U.S. at 592-93 (Justice O'Connor's analysis "provides a sound analytical framework for evaluating religious symbols."); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 17 (1989); *Ball*, 473 U.S. at 389; *Jaffree*, 472 U.S. at 60.

After *Lynch*, the Court decided *Lee v. Weisman*, 505 U.S. 577 (1992). In *Lee*, the Court observed, "[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'established a state religion or religious faith, or tends to do so.'" *Id.* at 587 (quoting *Lynch*, 465 U.S. at 678). For a practice to have a coercive effect, and thus be unconstitutional, it need not

involve direct coercion in the form of a threatened penalty or legal sanction. *See id.* at 592-95. Rather, indirect coercion such as peer pressure will suffice. *Id.* at 592-93. Consequently, in *Lee*, the Court struck down a school's practice of providing a clergyman to deliver a non-sectarian benediction at a high school graduation because students could be pressured by their peers to actually or symbolically participate in the prayer against their wishes. *Id.* at 593.

While the principles discussed in the foregoing cases, *Lemon*, *Lynch* and *Lee*, help guide the Court's analysis, there remains an abstract quality about these principles such that prohibited and acceptable religious activity in public schools is not always readily discernible. There are however, a number of activities which clearly fall on one side of the line or the other. It will be helpful to review these activities before the Court turns to the constitutionality of the statute at issue.

Acknowledging the significant and pervasive role of religion throughout our history, the Supreme Court has repeatedly stated that religion can and should play a role in our public schools' curriculum. Over the centuries, religion has been the dominant developmental force in the humanities -- art, music, literature and the other humanities. The Establishment Clause does not prevent children who attend public schools from learning about these subjects nor from learning about the influence of religion on these subjects. See *Edwards v. Aguillard*, 482 U.S. at 607-08 (Powell, J., concurring). Moreover, "the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative

religion, or the like." *Stone v. Graham*, 449 U.S. 39, 42 (1980). "The Establishment Clause is properly understood to prohibit the use of the Bible and other religious documents in public school education only when the purpose of the use is to advance a particular religious belief." *Aguillard*, 482 U.S. at 608 (Powell, J., concurring).

As noted earlier, the Free Exercise Clause protects absolutely the right to believe whatever we choose. This right, coupled with our right to freedom of speech found in the First Amendment[7], allows people to espouse their beliefs, including their religious beliefs, in any "public forum"[8] limited only by reasonable time, place and manner restrictions. *See United States Postal Serv. v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 132 (1981). Children attending public school are "Constitutional people," possessed of Constitutional rights and entitled to Constitutional protections. *See In re Gault*, 387 U.S. 1, 13 (1967) ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 511 (1969) ("Students in school as well as out of school are 'persons' under our Constitution.").

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[7] "Congress shall make no law ... abridging the freedom of speech." U.S. Const. amend. I.

[8] "Public forum" analysis involves determining whether a location, by tradition or government fiat, is dedicated to assembly, debate or expressive activity. *See Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45-46 (1983). If so, "the rights of the State to limit expressive activity are sharply circumscribed." *Id.* at 45.

Therefore, subject to the limitations discussed below, children attending public school have the right to espouse their religious beliefs.

The Court's acknowledgment of this right, while intended to be informative, is also dispositive of the issue at hand, the constitutionality of Ala. Code § 16-1-20.3. Section 16-1-20.3(b) provides that public school students may engage in student-initiated, **non-sectarian**[9], **non-proselytizing**[10] prayer during compulsory and non-compulsory school-related events. According to the statement of purpose found in subsection (a), the statute is intended "to provide guidance to public school officials on the rights and requirements of the law." Ala. Code § 16-1-20.3(a). In an effort to assure the public and the courts that the statute does not diminish generally the constitutional rights of public school students, and thus "save" the statute, the Alabama legislature added subsection (c) which states that the statute "shall not diminish the right of any student or person to exercise his or her rights of free speech and religion ... at times or events **other than those stated in subsection (b)**." Ala.Code

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[9] "Sectarian" religious speech is that which is "confined to the limits of one religious group, one school, or one party." *Webster's Third International Dictionary*, 2052 (1961).

[10] "Proselytizing" religious speech is that which is intended to "convert [another] from one religion, belief, opinion, or party to another." *Webster's Third International Dictionary*, 1821 (1961).

§ 16-1-20.3(c) (emphasis added).[11] The "times and events" referred to in subsection (c) are "compulsory or non-compulsory school-related student assemblies, school-related student sporting events, school-related graduation or commencement ceremonies, and other school-related student events." Ala. Code § 16-1-20.3(b). That is, subsection (c) assures the public that the statute has no effect on the constitutional rights of public school students, including the rights of free speech and prayer, **except** during the times and events enumerated in subsection (b). Regrettably, instead of "saving" the statute, subsection (c) highlights the impermissible effect of the statute -- the statute

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[11]In whole, subsection (b) provides:

> On public school, other public, or other property, non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benedictions, shall be permitted during compulsory or non-compulsory school- related student assemblies, school-related student sporting events, school-related graduation or commencement ceremonies, and other school-related student events.

Ala. Code § 16-1-20.3(b) (1995).

In whole, subsection (c) provides:

> Nothing in this section shall otherwise diminish the right of any student or person to exercise his or her rights of free speech and religion, including prayer, as permitted by the United States Constitution and the Alabama Constitution on public school or other public property, or other property, at times or events other than those stated in subsection (b).

Ala. Code § 16-1-20.3(c) (1995).

diminishes public school students' free speech and prayer rights during the times and events listed in subsection (b).

The Alabama legislature has defined its public school students' free speech and prayer rights too narrowly. To the extent that students' free speech rights attach, they are free to engage in **sectarian, proselytizing** religious speech. The legislature's effort to limit the application of the statute's constrictive definition of public school students' free speech and prayer rights to "school-related student events" fails to affect the Court's analysis. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. Accordingly, the Court finds that § 16-1-20.3 is unconstitutional because it infringes public school students' free speech and prayer rights.[12]

The Establishment Clause does not forbid private

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[12] The state of Alabama may have been justified by limiting its public school students' free speech and religion rights, *see Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (holding students in school have limited free speech rights); *New Jersey v. T.L.O.*, 469 U.S. 325, 337-41 (1985) (holding students in school have limited rights under the Fourth Amendment), but the state has failed to present any reason for this limitation on its public school students' rights. Nevertheless, the Court does not rest its finding that § 16-1-20.3 is unconstitutional on this basis alone. As will be demonstrated in the discussion below, the statute is unconstitutional for a number of reasons.

sectarian,[13] proselytizing speech. In fact, the Establishment Clause has no bearing at all on private speech. The Establishment Clause operates only on government or state-sponsored speech, and then, prohibits all religious speech, not only sectarian, proselytizing religious speech. *See, e.g., Lee*, 505 U.S. at 588-89 (forbidding state-sponsored non-sectarian prayer); *Engel*, 370 U.S. at 430 (same); *Ingebretsen*, 88 F.3d at 279-80 (holding unconstitutional statute which permits student-initiated, non-sectarian, non-proselytizing prayer in public school). This is so because, in addition to forbidding the government from favoring one religion over another, the Establishment Clause forbids the government from favoring religion over non-religion. *E.g. Jaffree*, 472 U.S. at 53 ("the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all"); *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. Unit A 1981), *aff'd*, 455 U.S. 913 (1982).[14]

Thus, § 16-1-20.3 is fatally flawed in that it defines students' free speech and religion rights too narrowly. When these rights attach to students in school, they may engage in

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[13] The Court doubts whether religious speech can truly be "non-sectarian;" while some prayers are undoubtedly general in nature, all would seem to be imbued with some elements of the speaker's faith. *See Schempp*, 374 U.S. at 282-86 (Brennan J., concurring).

[14] Decisions of the former Fifth Circuit filed prior to October 1, 1981, constitute binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc).

sectarian, proselytizing religious speech. And, of course, it is the duty of this Court and all other courts to protect these constitutional rights when and if they are impinged. There are, however, some limitations on the rights of students to engage in speech of any type while they are in school.

In *Tinker*, the Supreme Court recognized that public school students have free speech rights. *See* 393 U.S. at 511. However, the Court noted that "conduct by the student, in class or out of it, which for any reason -- whether it stems from time, place, or type of behavior -- materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Id.* at 513. In *Bethel School District Number 403 v. Fraser*, 478 U.S. 675 (1986), the Court expounded on the limitations on students' free speech rights. The Court held that the free speech rights of students in school are not co-extensive with the free speech rights of adults. *Id.* at 682 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 340-42 (1985)). The Court noted that while students were free to advocate political and religious views outside of school, this right is tempered during school by "the sensibilities of fellow students." *Id.* at 681; *see also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988). The need to curtail controversial, disruptive or offensive speech is heightened when students are part of a "captive audience." *See Fraser*, 478 U.S. at 684. Thus, even though the Establishment Clause places no limitation on purely "private" speech, in school, a student's right to espouse his or her religious beliefs is limited by the foregoing principles.

Whether a student's free speech rights attach, such that he or she is able to freely espouse his or her religious beliefs, is necessarily a factual inquiry. It cannot be determined in the abstract whether a school has created a limited public forum, *see Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46-47 (1983) (making factual inquiry), such that a student's speech cannot be curtailed on the basis of content, *see* 20 U.S.C. §§ 4071-4074; *Bd. of Educ. v. Mergens*, 496 U.S. 226, 253 (1990), or viewpoint, *see Rosenberger v. Rector and the Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2516-17 (1995).[15] Nor can it be determined in the abstract whether a student's private religious speech is disruptive or impinges the rights of other students. However, school officials should be particularly wary of these dangers when a student advocates his or her religious beliefs in situations where the student's peers are unable to move about freely (and thereby avoid listening to speech they find disagreeable) and/or when the student's peers are unable to freely express themselves in response (because school officials are actively controlling a particular setting).[16]

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[15] The Court notes that public schools are not traditional public fora. *See, e.g., Lamb's Chapel v. Center Moriches Union Sch. Dist.*, 508 U.S. at 392; *Hazelwood Sch. Dist. V. Kuhlmeier*, 484 U.S. at 267.

[16] The Court would distinguish the above-described situations from those periods during which students are "in school" or attending a school-event but school officials exercise minimal supervisory control and students are free to move about as they please. During these latter times, *e.g.*, in between classes or lunch (depending on the factual circumstances), the restrictions

While a determination of the scope of students' free speech rights requires the Court to make a factual inquiry, the Court notes that there are many forms of student religious expression which should, generally, be permissible. As long as students abide by a school's generally applicable rules and regulations, students should ordinarily be permitted to engage in the following forms of religious expression:[17]

> individual or group prayer or religious discussion outside of organized classes or school-sponsored events;
>
> reports, homework and artwork which reflect students' religious beliefs;
>
> distribution of religious literature (provided that the school generally permits students to distribute other literature not related to the school curriculum and that the religious literature is distributed in accordance with all applicable time, place and manner restrictions);

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on students' free speech rights are limited; students should be able to engage in sectarian, proselytizing, religious speech as long as it is not, for reasons other than its content, disruptive (*e.g.*, it is loud, the speaker is aggressive, etc.).

[17] This list is exemplary only; it is by no means intended to be a complete statement of permissible religious expression by public school students.

display of religious symbols, articles and medals (e.g., Crosses, Stars of David, St. Christopher and other religious medals, even replicas of the Ten Commandments) and/or clothing bearing religious messages (provided that the school allows students to display non-religious expressive symbols and apparel and such display is in accordance with all applicable time, place and manner restrictions); and

religious activity permitted by the Equal Access Act.[18]

Additionally, students may pray silently at any time so long as it does not interfere with their school work.

In providing this list, the Court has attempted to illustrate generally permissible, private student religious expression. The Establishment Clause does not prohibit such expression. The Establishment Clause does, however,

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[18] The "Equal Access Act," 20 U.S.C. § 4071(a), makes it unlawful for any public secondary school which receives federal financial assistance and which has created a limited public forum to deny access or discriminate against students who wish to conduct a meeting in that limited public forum on the basis of religious, political, philosophical, or other speech content. The Act contains a number of qualifications and emphasizes that official involvement in the student meetings must be non-participatory and strictly limited. *See* 20 U.S.C. §§ 4071(c) and (d).

unequivocally prohibit state sponsored religious expression in public schools. The principles found in the cases discussed above, *Lemon*, *Lynch* and *Lee*, help the Court identify those situations which implicate this forbidden activity. With this in mind, the Court returns to the question of whether, on its face, § 16-1-20.3 of the Ala. Code is constitutional.

The first question a court must ask of challenged legislation is whether it was enacted for a secular legislative purpose. *Lemon*, 403 U.S. at 612. "In applying the purpose test, it is appropriate to ask 'whether government's actual purpose it to endorse or disapprove of religion.'" *Wallace v Jaffree*, 472 U.S. at 56 (quoting *Lynch*, 465 U.S. at 690). While courts should normally be deferential to a legislature's stated purpose, the statement of such purpose must be sincere and not a sham. *Edwards*, 482 U.S. at 586-87.

Section 16-1-20.3(a) is a statement of legislative purpose. This section provides:

> The legislative intent and purpose for this section is to protect the freedom of speech guaranteed by the First Amendment to the United States Constitution and Article I, Section 4 of the Constitution of Alabama of 1901, to define for the citizens of Alabama the rights and privileges that are accorded them on public school and other public property and at school-related events, and to provide guidance to public school officials on the rights and requirements of law they must apply. Further, the intent and

> purpose of the Legislature is to properly accommodate the free exercise of religious rights of its student citizens in the public schools and at public school events as mandated by the First Amendment to the United States Constitution and the judicial interpretations thereof as given by the United States Supreme Court.

It is clear from this statement that the Alabama legislature sought to articulate a secular purpose for enacting § 16-1-20.3, and thus, distinguish this statute from its predecessor, § 16-1-20.1, which the Supreme Court held was not enacted for a secular purpose. *Jaffree*, 472 U.S. at 61. Section 16-1-20.1 provided that in public schools, at the beginning of each day, a moment of silence would be set aside for meditation or voluntary prayer. The statute's legislative history revealed that it was enacted to return voluntary prayer to Alabama's public schools. *Id.* at 56-58. This purpose was confirmed when the Court considered the statute's relationship to other state laws. Prior to enacting § 16-1-20.1, Alabama already had a law which set aside a moment of silence at the beginning of the school-day. *See Ala. Code* § 16-1-20. All that was added by enacting § 16-1-20.1 was to make explicit that the moment of silence could be used for voluntary prayer. *Jaffree*, 472 U.S. at 58-59. Of course, students already enjoy a constitutional right to voluntarily engage in silent prayer. *See supra* at 6-7, 21. The Court noted that § 16-1-20 did nothing to abridge this right. *Jaffree*, 472 U.S. at 59. The Court concluded, therefore, that § 16-1-20.1 was enacted to emphasize that public

school students have a right to pray, and that this was not a secular purpose. *See id.* at 59-61.

In *Ingebretsen v. Jackson Public Sch.*, 88 F.3d 274, the Fifth Circuit had before it a facial constitutional challenge to a statute strikingly similar to the one before this Court. The statute at issue in *Ingebretsen*, *Miss. Code Ann.* § 37-13-4.1, contained a statement of legislative purpose which was almost a verbatim copy of the statement quoted above. *See* § 37-13-4.1(1)[19] Nevertheless, the court found that the statute was not enacted for a secular purpose. *Ingebretsen*, 88 F.3d at 279. The court stated:

> The legislature declared that its purpose in enacting the School Prayer Statute was 'to accommodate the free exercise of religious rights

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[19] Section 37-13-4.1(1) provides:

> The legislative intent and purpose for this section is to protect the freedom of speech guaranteed by the First Amendment to the United States constitution, to define for the citizens of Mississippi the rights and privileges that are accorded them on public school property, other public property or other property at school-related events; and to provide guidance to public school officials on the rights and requirements of law that they must apply. The intent and purpose of the Legislature is to accommodate the free exercise of religious rights of its student citizens in the public schools and at public school events as provided to them by the First Amendment to the United States Constitution and the judicial interpretations thereof as given by the United States Supreme Court.

> of its student citizens in the public schools.' This statement of purpose cannot be characterized as 'secular' because its clear intent is to inform students, teachers and school administrators that they can pray at any school event so long as a student 'initiates' the prayer (ostensibly by suggesting that a prayer be given).

Id. (citation omitted).

The same can be said about § 16-1-20.3 of the Alabama Code. Although the statement of purpose proclaims the statute was intended to protect "freedom of speech," the only speech which the statute "protects" is religious speech. The statute does nothing to secure students' general free speech rights. Because the statute does not further its stated purpose, the purpose may properly be disregarded. See *Edwards*, 482 U.S. at 586; see also *Black Horse*, 84 F.3d at 1484-85 (holding that school board policy which allowed students to decide whether to have prayer at graduation is unconstitutional, wherein court disregarded asserted secular purpose of protecting free speech rights because policy did not address students' general free speech rights at graduation and only impacted religious speech). The Court does not believe that singling out one type of speech, religious speech, and informing school officials and the public that students have an unqualified right to engage in this one type of speech, constitutes a secular purpose. Instead, by singling out religious speech, § 16-1-20.3 endorses religion. See *Jaffree*, 472 U.S. at 60.

The legislature's statement that § 16-1-20.3 is an effort

to accommodate students' free exercise of their religious rights does not save the statute. As the *Ingebretsen* Court noted, informing students that they have the right to pray at any school event is not a secular purpose. 88 F.3d at 279. Furthermore, government properly "accommodates" religion only when the free exercise of religion is in some way burdened. *See, e.g., Jaffree*, 472 U.S. at 57 n.45; *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring in judgment); *Employment Security Division*, 450 U.S. 707, 717-18 1981). Here, there has been no showing that the Free Exercise rights of the students in Alabama's public schools[20] have been burdened.[21] Therefore, the claim that § 16-1-20.3 is intended to protect students' Free Exercise rights cannot be regarded as a legitimate secular purpose. *See Jaffree*, 472 U.S. at 57 n.45.

Moreover, the sectarian origins of § 16-1-20.3 are revealed in a letter from the Alabama Attorney General to the law's sponsor, Representative Bill Fuller. In this letter, the Attorney General, at the behest of Rep. Fuller, evaluated the constitutionality of a draft bill with language similar to that which appears in § 16-1-20.3(b). The letter states (referring to

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[20] As noted earlier, the Court stands ready, willing and able to protect these rights when and if they are impinged. *See supra* pp. 18-19.

[21] The only "burden" on students' free exercise rights which the Court can discern is that imposed by the Establishment Clause. However, this is a "burden" which the state of Alabama cannot remove. *Jaffree*, 472 U.S. at 83-84 (0'Connor J., concurring).

Rep. Fuller): "You ask: What is the strongest, clearest constitutional language which Alabama might enact **restoring student prayer to public schools**?" Ex. A attached to Gov.'s and Atty. General's Resp. Br. on Constitutionality of Ala. Code § 16-1-20.3 (emphasis added). Restoring prayer to public schools is a patently non-secular purpose. *See Jaffree*, 472 U.S. at 56-60.[22]

A statute which lacks a clearly secular purpose is unconstitutional on its face. *See Edwards*, 482 U.S. at 594; *Jaffree*, 472 U.S. at 56-60. Here, although the Alabama legislature sought to recite a secular purpose for enacting § 16-1-20.3, the Court finds that the preeminent purpose behind the statute was to endorse religion. Accordingly, the Court finds that § 16-1-20.3 violates the Establishment Clause. *See Edwards*, 482 U.S. at 590-94; *Jaffree*, 472 U.S. at 56-61; *Stone*, 449 U.S. at 41-43; *Jager*, 862 F.2d at 830; *Karen B.*, 653 F.2d at 901.[23]

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[22] The Court recognizes that a statement of purpose by one legislator is not equivalent to a statement of legislative purpose. *See Mergens*, 496 U.S. at 249. Nonetheless, the Court finds a statement of purpose made by the sponsor of § 16-1-20.3, which was submitted to the Court **by the defendant**, to be relevant to the question of legislative purpose.

[23] The instant case is distinguishable from *Bown v. Gwinnett County Sch. Dist.*, 895 F. Supp. 1564 (N.D. Ga. 1995), where the court found that a statute which provided for a moment of silence at the beginning of the school day, was enacted for a secular purpose. Setting aside a moment of silence so that students can reflect on the anticipated activities of the day is, arguably, a secular purpose. *See Jaffree*, 472 U.S. at 72-73; but see

Even if § 16-1-20.3 were enacted for a wholly secular purpose, the Court would still be compelled to find the statute unconstitutional because the Court finds the primary effect of § 16-1-20.3 is to endorse religion and the Court finds that § 16-1-20.3 results in excessive entanglement between the state and religion. *See Lemon*, 403 U.S. at 612-13. Irrespective of the State's actual purpose, if legislation conveys either a message of endorsement or disapproval of religion it is unconstitutional. *Jager*, 862 F.2d at 831 (citing *Jaffree*, 472 U.S. at 56 n.42).

The effect of § 16-1-20.3(b) is to permit students to pray at school-related events, compulsory or non-compulsory, as long as the prayer is non-sectarian and non-proselytizing. The statute singles out prayer as the one form of student speech which must be permitted at these school events. Prayer is unquestionably a religious practice. *Engel*, 370 U.S. at 424-25; *Karen B.*, 653 F.2d at 901 ("prayer is perhaps the quintessential religious practice for many of the world's faiths, and it plays a significant role in the devotional lives of most religious people"). It is clear, therefore, that the effect of the statute is to favor religion over non-religion, an effect which is prohibited by the

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Gilbert A. Holmes, *Student Expression in School: Is it Religion or Speech, and Does it Matter*, 49 U. Miami L. Rev 377, 411 n. 202, 412 n.208 (1994) ("moments of silence serve a reverent purpose"). The statute at issue in *Bown* clearly served that purpose. *See* Ga. Code Ann. § 20-2-1050(a). In the instant case, § 16-1-20.3 does not serve the asserted secular purpose for which it was enacted, to protect students' free speech rights. Therefore, in the instant case, unlike Bown, the legislature's asserted secular purpose does not control the Court's inquiry.

Establishment Clause. *C.f. Mergens*, 496 U.S. at 249 (Equal Access Act not intended to endorse religion because "the Act on its face grants equal access to both secular and religious speech").

A second effect of § 16-1-20.3(b) is to force non-consenting students to listen to and/or participate[24] in prayer. The statute requires that prayer be permitted at school-events, including compulsory school-events.[25] Other students attending these school- events (those who do not wish to pray) will have

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[24] Students are not compelled under § 16-1-20.3(b) to verbally join their peers when they choose to pray at a "school-related" event. However, at a compulsory event, a student who did not wish to pray would have no choice but to remain and listen to his or her peers' prayers. Because the statute gives students the absolute right to pray at such events, a dissenting student could not protest another student's prayer. Unable to interfere with the absolute prayer right provided in the statute, the dissenting student would have to remain silent, while his or her peers, perhaps a majority of his or her peers, prayed. In the face of such prayer, a student who remains silent may very well feel as though he or she has participated in the religious activity by acquiescence. *See Lee*, 505 U.S. at 593. Regardless of whether the dissenter is characterized as "participating" in the prayer, a student is injured whenever the machinery of the state is used to force the dissenter to listen to prayer. *See id.*

[25] The Court notes that students may be functionally compelled to attend school-events even when these events are not technically compulsory. *See Lee*, 505 U.S. at 593-95.

no choice but to listen to the prayers of their peers.[26] Dissenting students will be unable to walk away, and presumably, will be unable to voice their dissent.[27] Thus, the effect of § 16-1-20.3 is to create a school system wherein public school students must, at the whim of their peers, participate in a religious practice. "It is beyond dispute that, at a minimum the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Lee*, 505 U.S. at 587. It is precisely this forbidden effect which § 16-1-20.3 creates.

The foregoing analysis is not changed by the fact that under § 16-1-20.3 the students ultimately decide whether there will or will not be prayer at the referenced school-events (§ 16-1-20.3(b) refers only to student-initiated prayer). *See Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759, 760 (9th Cir. 1981), *cert. denied*, 454 U.S. 863 (1981). A practice which tends towards the establishment of religion cannot be made secular by delegating some aspect of the practice to non-governmental

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[26] Indeed, § 16-1-20.3 does not contain the seemingly obligatory "opt-out" provision which frequently appears in this type of legislation. *See, e.g., Schempp*, 374 U.S. at 205; *Engel*, 370 U.S. at 423.

[27] Section 16-1-20.2 does not provide dissenting students with the right to verbally object to prayers offered at these school-related events. Moreover, since the statute mandates that students have the right to pray, school officials might find it necessary to silence a dissenting student who interfered with this prayer right. The effect of such action would clearly be an endorsement of religion. *See Ball*, 473 U.S. at 389 (government promotes religion when it fosters a close identification between its powers and religion).

actors. *See Board. Of Education of Kiryas Joel Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2489 (1994); *Black Horse*, 84 F.3d at 1477. The state of Alabama, by enacting a statute which gives students the absolute right to pray at compulsory student events, has sown the seeds of religious establishment. That the final step is carried out by non-governmental actors is of no consequence.

Nor is it of any significance that the statute only authorizes "non-sectarian, non-proselytizing" prayer. The Establishment Clause does more than protect against coerced indoctrination in one particular faith; as the Supreme Court has noted time and again, the Establishment Clause prevents government from favoring religion over non-religion. *E.g., County of Allegheny*, 492 U.S. at 591; *Aguillard*, 482 U.S. at 585; *Jaffree*, 472 U.S. at 53; *Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.5. 756, 771 (1973) ("[I]t is now firmly established that a law may be one 'respecting an establishment of religion' even though its consequence is not to promote a 'state religion,' and even though it does not aid one religion more than another but merely benefits all religions alike.") (citations omitted); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) ("[Government cannot] pass laws or impose requirements which aid all religions as against non-believers."). And, while the statute may not authorize student prayer which contains a coercive element, as the Court has discussed above, any prayer in a compulsory school setting may have a forbidden coercive effect.

Finally, § 16-1-20.3 is unconstitutional because it fosters excessive entanglement between religion and the state. The

operative section of the statute, subsection (b), contains ambiguous terms such as non-sectarian and non-proselytizing.[28] Since the student speech permitted by § 16-1-20.3(b) is limited to non-sectarian, non-proselytizing prayer, school officials will be forced to monitor the student prayers and decide which prayers are permissible.[29] Such action by school officials could lead impressionable schoolchildren to believe that permitted prayers are officially sanctioned. See *Karen B.*, 653 F.2d at 902.[30]

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[28] Contrary to defendants' assertion, the mere fact that the Supreme Court has uttered these words does not render them "safe to use in statutory form without fear of ambiguity." Gov. and Atty. General's Br. in Resp. to Pl.'s Mot. for Summ. J. on Constitutionality of § 16-1-20.3 at 23. The Court has not defined these words such that reasonable students who choose to pray and reasonable officials who must monitor those prayers could readily agree on their definition. Ironically, in *Lee v. Weisman*, to insure the "nonsectarian" nature of a graduation prayer, the school principal had to provide the clergyman selected to deliver the prayer with written guidelines on what would constitute a nonsectarian prayer. 505 U.S. at 588. It was, in part, the principal's provision of those guidelines which led the Court to declare the graduation prayers unconstitutional.

[29] The Court notes that this task would be a difficult one. School officials may be no better able to identify "non-sectarian, non-proselytizing" prayers than the students making them. The task would be even more difficult where the official making the decision was unfamiliar with the prayer and religion in question. The resultant potential for inconsistent rules and favoritism among religions is further reason to question the statute.

[30] Like the Mississippi statute before the *Ingebretsen* Court, § 16-1-20.3 contains a number of ambiguities. In addition to those discussed above, the

Furthermore, the review of prayers by government officials is one of the very practices which the First Amendment was designed to prevent. The framers knew that government involvement with one's religious practices would inevitably taint the sanctity of one's faith. *See Engel*, 370 U.S. at 431. The implementation of § 16-1-20.3 will require school officials to make content-based reviews of students' prayers. The framers believed that such review posed far too great a danger to our freedom of religion. The First Amendment prevents Alabama school officials from taking the very action which implementing § 16-1-20.3 would require.

In addition to monitoring the content of the student prayers, implementing § 16-1-20.3 will force school officials to monitor the conduct of dissenting students. If the guarantee of § 16-1-20.3(b) is to be given effect, school officials will have to prevent dissenting students from interfering with students who exercise their right to pray. This need to continually monitor both the content of the prayers and the conduct of dissenting students results in "excessive and enduring entanglements between state and church" which is forbidden by the

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statute does not define "school-related events," nor does it define "student-initiated" prayer. This latter ambiguity is particularly troublesome as it could be construed to allow students to authorize third parties, such as clergymen or school officials, to deliver prayers in the public schools. *See Ingebretsen*, 88 F.3d at 280; *Ingebretsen v. Jackson Public Sch. Dist.*, 864 F. Supp. 1473, 1483 (S.D. Miss. 1994). This, of course, is an activity which has been expressly forbidden by the Supreme Court. *E.g.*, *Lee*, 505 U.S. at 599; *Schempp*, 374 U.S. at 223.

Establishment Clause. *Lemon*, 403 U.S. at 619.

Thus, the Court finds that § 16-1-20.3 is unconstitutional because it (1) unreasonably restricts the private speech and religion rights of public school students; (2) was not enacted for a secular purpose; (3) has the primary effect of endorsing religion; (4) has the further effect of coercing public school students to participate in religious activity; and (5) creates excessive entanglement between religion and the state by forcing school officials to continually monitor both the content of prayer and the conduct of dissenting students. Nevertheless, the defendants urge the Court to give the statute a "narrowing construction" such that the statute is saved. In the alternative, the defendants assert that the Court should sever any portion of the statute which is unconstitutional leaving the remainder intact. Neither of these suggestions is tenable.

The defendants cite *United States v. Salerno*, 481 U.S. 739, 744 (1987), for the proposition that a reviewing court must uphold the constitutionality of a statute challenged on its face unless there is no set of circumstances under which the statute may be constitutionally applied. *Salerno* involved a facial challenge to the Bail Reform Act of 1984, 18 U.S.C. § 3141 *et seq*. *Id.* at 741. The Court stated that to successfully mount a facial challenge to the Act, the plaintiff had to establish that "no set of circumstances exist under which the Act would be valid." *Id.* at 745. However, the Court was careful to note that the case was not one which involved a challenge under the First Amendment. *Id.*

The Court does not apply the onerous *Salerno* test when

a statute is challenged on its face as being contrary to the First Amendment. Instead, when a statute is challenged as violative of the Establishment Clause, the Court "assess[es] the constitutionality of an enactment by reference to the three factors first articulated in *Lemon v. Kurtzman*." *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988). When a statute is challenged under the Establishment Clause, the Court makes no distinction between a "facial" and an "as-applied" challenge. *Id.* at 600-01. Therefore, the inquiry in *Salerno*, whether there is any set of circumstances under which the statute could be constitutionally applied, is not relevant to the instant case. The standard to be applied is that set forth in *Lemon*, a task which the Court has undertaken above.[31]

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[31] Assuming arguendo that the Court is bound to construe the statute to be constitutional if possible, the statute would still fail to survive the Court's review. Nothing short of completely rewriting the operative portion of the statute, subsection (b), will make the statute constitutional. This is a task which the Court will not undertake. *See Chapman v. United States*, 500 U.S. 453, 464 (1991). Section 16-1-20.3(b) provides that students **shall be permitted** to engage in non-sectarian, non-proselytizing prayer at compulsory and non-compulsory school-related student events. As the Court's previous discussion demonstrates, under the dictates of the Establishment Clause and Supreme Court decisions, students do not have an absolute right to engage in such prayer. While the defendants argue that the statute does no more than recognize students' free exercise and free speech rights, the Court will not ignore the plain meaning of the statute. The United States Constitution reflects the fact that students have free exercise and free speech rights; section 16-1-20.3 both impinges these rights and authorizes religious activity in our public schools which is

The Court's analysis under Lemon, above, leads the Court to find that the statute cannot be saved by means of severing those portions of the statute which are unconstitutional. The Court has found that in enacting § 16-1-20.3 the Alabama legislature lacked a secular purpose. Because the statute as a whole is an effort to instill prayer in Alabama public schools, the statute as a whole is unconstitutional. *See Jaffree*, 472 U.S. at 61; *Ingebretsen*, 88 F.3d at 279. Moreover subsection (b) of the statute is the only operative portion of the statute. As discussed above, the effect of this subsection is to endorse religion and create excessive entanglement between the state and religion. Subsection (b), therefore, is plainly unconstitutional. The other subsections in 16-1-20.3, subsections (a)[32], (c)[33] and (d)[34], clearly

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plainly unconstitutional.

[32] The text of this subsection was fully quoted on page 24, *supra*.

[33] The text of this subsection was fully quoted on page 17 n.12, *supra*.

[34] This subsection provides:

> The exercise of these rights on public school or other public property, or on other property for school- related activities, by students or others, shall not be construed to indicate any support, approval, or sanction by the State of Alabama, any political subdivision thereof, municipal corporation, governmental entity of any description, or any agent or employee of any governmental entity of the contents of any such prayer, invocation, benediction, or other activity, or be an unconstitutional use of any public school property or other public property, or be the promotion or establishment of any religion or religious belief.

Ala. Code § 16-1-20.3(d) (1995).

have no purpose other than to qualify subsection (b). Therefore, if subsection (b) is severed, the remaining subsections become meaningless. The Alabama legislature surely did not intend to enact a meaningless statute. *See Jaffree*, 472 U.S. at 59. Accordingly, the Court finds that the entire statute must be stricken as unconstitutional.

By enacting § 16-1-20.3, the Alabama legislature sought to return prayer to the State's public schools. However, one need not "return" something which was never absent. The Constitution guarantees that public school students have the right to "freedom of religion," and "freedom of speech." Under most circumstances, public school students have the right to engage in private religious speech **of any type**. Therein lies the great irony of § 16-1-20.3. The statute is unconstitutional because it unreasonably restricts the free speech and religion rights of Alabama's public school students.

The Constitution gives the people of Alabama the right to freely exercise their religious beliefs. The Constitution also guarantees that the State of Alabama cannot establish or endorse religion. It is the duty of this and every other court to uphold these rights if and when they are infringed. Here, the state of Alabama has infringed upon them both. Accordingly, Ala. Code § 16-1-20.3 is due to be stricken. It is as true now as when first stated by the late Mr. Justice Frankfurter, "[i]f nowhere else, in the relation between Church and State, 'good fences make good neighbors.'" *McCollum v. Board of Educ.*, 333 U.S. 203, 232 (1948).

ORDER

ORDER

For all of the foregoing reasons, it is CONSIDERED and ORDERED that plaintiff's motion for summary judgment on the constitutionality of Ala. Code § 16-1-20.3 be and the same is hereby GRANTED. The Court finds that § 16-1-20.3 is unconstitutional in that it violates the mandates of the First Amendment to the United States Constitution as interpreted by the United States Supreme Court and the Court of Appeals for the Eleventh Circuit.

It is further CONSIDERED and ORDERED that in light of this Memorandum Opinion, the plaintiff and the "DeKalb County defendants," within 15 days of the receipt of this Memorandum Opinion and Order, be and the same are hereby DIRECTED to engage in settlement negotiations and report to the Court the results thereof.

It is further CONSIDERED and ORDERED that the United States Marshall personally serve courtesy copies of this Memorandum Opinion and Order on:

Honorable Forrest H. "Fob" James, Governor of Alabama;

Honorable Don Siegelman, Lieutenant Governor of Alabama;

Honorable James S. Clark, Speaker of the House of Representatives of Alabama;

Honorable William H. Pryor, Jr., Attorney General of Alabama;

Honorable Ed Richardson, Superintendent of Education of Alabama; and

Honorable William P. Gray, Jr., legal advisor to Governor James.

DONE this the 12th day of March, 1997.

/s/Ira DeMent
United States District Judge

Appendix D

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DISTRICT

MICHAEL CHANDLER, et al.,

Plaintiffs, **CV 96-D-169-N**

v.

FOB JAMES, et al,

Defendants.

PERMANENT INJUNCTION

In accordance with the court's previous opinions, as well as the record as a whole in this cause, it is CONSIDERED and ORDERED as follows:

1. The Defendant Governor of Alabama, his successors in office, and all those in active concert and participation with him or her are herewith PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, permitting, procuring, or otherwise enforcing the provisions of Alabama Code § 16-1-20.3 and any regulations, directives, or

policies implementing its provisions.

2. The Attorney General of Alabama, his successors in office, and all those in active concert and participation with him or her, including, but not limited to, all deputy and assistants Attorneys General, are herewith PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, permitting, procuring, or otherwise enforcing the provisions of Alabama Code § 16-1-20.3 and any regulations, directives, or policies implementing its provisions.

3. The Defendant Alabama State Board of Education, its officers, agents, servants, employees, successors and assigns, and all those in active concert and participation with him or her are herewith PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, permitting, procuring, or otherwise enforcing the provisions of Alabama Code § 16-1-20.3 and any regulations, directives, or policies implementing its provisions.

4. The Defendants, and each of them, Ed Richardson, Bradley Byrne, Stephanie Bell, G.J. "Dutch" Higginbotham, Ethel H. Hall, Willie Paul, David F. Byers, Jr., Sandra Ray, and Mary Jane Caylor, and each of their successors in office, and all those in active concert and participation with each are herewith PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, permitting, procuring, or otherwise enforcing the provisions of Alabama

Code § 16-1- 20.3 and any regulations, directives, or policies implementing its provisions.

5. The Defendants, and each of them, DeKalb County Board of Education, Weldon Parrish, Willard A. Israel, Tommie Johnson, Mary Etta Bailey, Johnny Young, and Jimmy Wilbanks, and each of their successors in office, and all those in active concert and participation with each (including, but not limited to, principals, school administrators, staff and teachers employed, assigned, or utilized within the DeKalb County school system) are herewith PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, permitting, procuring, or otherwise enforcing the provisions of Alabama Code § 16-1-20.3 and any regulations, directives, or policies implementing its provisions.

6. The Defendants, and each of them, DeKalb County Board of Education, Weldon Parrish, Willard A. Israel, Tommie Johnson, Mary Etta Bailey, Johnny Young, and Jimmy Wilbanks, and each of their successors in office, and all those in active concert and participation with each (including, but not limited to, principals, school administrators, staff and teachers employed, assigned, or utilized within the DeKalb County school system) are herewith PERMANENTLY ENJOINED from each and all of the following activities, policies, practices, and conduct:

(a) Regarding Classroom Activities and Instructional Settings. The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling,

inducing, ordering, procuring, or permitting *school organized* or *officially sanctioned* religious activity in the classrooms of DeKalb County schools *including, but not limited to*: vocal prayer; Bible and religious devotional or scriptural readings; distribution of religious materials, texts, or announcements; and discussions of a devotional/inspirational nature, regardless of whether the activity is initiated, led by, or engaged in by students.

This PERMANENT INJUNCTION DOES NOT proscribe the educational use of religious texts in the classroom to the extent that material so used is presented in an objective and academic manner, for example, as part of a course of study.

This PERMANENT INJUNCTION DOES NOT proscribe students' voluntary expression of their own religious beliefs in the form of homework, reports, artwork, or other school assignments as applicable and as academically appropriate.

This PERMANENT INJUNCTION DOES NOT proscribe the display of religious symbols, articles and medals (for example, Crosses and Stars of David) and/or clothing bearing religious messages (provided that the school allows students to display non- religious expressive symbols and apparel and such display is in accordance with all applicable time, place, and manner restrictions).

This PERMANNENT INJUNCTION DOES NOT affect the rights of secondary-school students to engage in religious

activity during non-instructional time that is consistent with the federal Equal Access Act, 20 U.S.C. § 4071 *et seq*, or to quietly engage in religious activity during non-instructional times, *so long as it does not unduly call attention thereto and so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its imposition upon themselves.*

This PERMANENT INJUNCTION DOES NOT prohibit students from distributing religious materials to classmates during non-instructional time, subject to the same time, place, and manner restrictions imposed on student distributions of non-religious materials, subject to the provisions of paragraph 6(e) below.

(b) Regarding Graduation or Commencement Exercises. The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, participating in, or permitting, prayers, invocations, benedictions, or devotional messages at graduation or commencement exercises, regardless of whether such prayer, invocation, benediction, or devotional message is offered by clergy, a student, administrator, teacher, school employee, or non-school person, regardless of how such prayer, invocation, benediction, or devotional message is denominated, and regardless of whether a public-address system is used. The Defendants, and each of them, are specifically PERMANENTLY ENJOINED from permitting such activity at

commencement or graduation exercises in the guise of valedictory, salutatory, historian, or similar student addresses and remarks.

This PERMANENT INJUNCTION DOES NOT proscribe a brief personal expression by a student which contains religious references during a commencement exercise or student address (for example, a student may express thanks to Deity for his or her academic success),[1] provided that such expression is not encouraged in any by school officials and does not invite audience participation or response (for example, a student speaker may not invite the audience to participate with him or her in prayer or urge the audience to take a moment with him or her to thank Deity). Where enjoined activity by students occurs, it is CONSIDERED that school officials be and they are hereby ORDERED to take appropriate disciplinary action as they would for any violation of school disciplinary rules, said disciplinary action being calculated to cause the cessation of the violative conduct as it occurs and to deter similar conduct in the future.

The Defendants, and each of them, are further

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[1] This is but one example of a brief permissible reference by a student to Deity or religion. This example is not meant by the court to suggest any form of expression to any student or to suggest that this is the only such reference that would be permissible. It is intended to be illustrative only, and to assist school officials in complying with the terms of this PERMANENT INJUNCTION.

PERMANENTLY ENJOINED from listing, announcing, or memorializing any religious activity or message on any commencement program at any DeKalb County school. The Defendants, and each of them, are specifically PERMANENTLY ENJOINED from printing baccalaureate announcements or commemorations or other materials regarding baccalaureate services on the commencement programs of DeKalb County public schools and from organizing or sponsoring any baccalaureate event (although they may attend). School officials are prohibited from encouraging or discouraging, directly, or indirectly, a student's attendance at baccalaureate services.

Specifically, school officials may not condition a student's attendance at commencement exercises on attendance at baccalaureate events.

(c) Regarding Use of Public-Address Systems for Religious Addresses. The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, participating in, or permitting, students, school employees, school officials, clergy, and non-school persons to pray or to deliver religious or devotional messages (including scriptural readings) over any public-address system during the instructional day (including the home room period) or in connection with any school-sponsored event, including, but not limited to, assemblies and sporting events. This provision

includes the delivery of daily announcements. No exception to this provision shall be permitted during times of perceived crisis or exigent circumstances. Where enjoined activity by students occurs, it is CONSIDERED that school officials be and they are hereby ORDERED to take appropriate disciplinary action as they would for any violation of school disciplinary rules, said disciplinary action being calculated to cause the cessation of such violative conduct as it occurs and to deter similar conduct in the future.

This PERMANENT INJUNCTION DOES NOT prohibit students from making announcements over the school public-address system regarding meetings of non-curricular religious clubs, provided that the announcements themselves do not contain a prayer or devotional, and provided that any such announcements are subject to the same time, place, and manner restrictions that apply to announcements of non-religious activities.

(d) Regarding School-Sponsored Assemblies and Events. The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, or otherwise participating in, or permitting, prayers, Biblical and scriptural readings, and other presentations or activities of a religious nature, at all *school-sponsored* or *school-initiated* assemblies and events (including, but not limited to, sporting events), regardless of whether the activity takes place during instructional time, regardless of

whether attendance is compulsory or non-compulsory, and regardless of whether the speaker/presenter is a student, school official or non-school person.

This PERMANENT INJUNCTION DOES NOT prevent secondary-school students from engaging in religious expression and activity during non-instructional time that is consistent with the federal Equal Access Act, 20 U.S.C. § 4071 *et seq*, which, while according students expressive rights, does not allow school officials to provide special privileges to non-curricular student religious clubs in terms of meetings and assemblies that they do not provide to other student clubs.

(e) Regarding Distribution of Bibles and Other Religious Tracts. The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, or otherwise permitting, school officials or non-school persons to enter any classroom or any school property where students are assembled, for the purpose of distributing Gideon Bibles or other religious tracts, literature, or paraphernalia to students on school property during the school day, including the home room period and any period during which students are required to be present in school, or at any school-sponsored event.

No distribution of Gideon Bibles or other religious tracts, literature, or paraphernalia by placement of them in a common area shall occur in the absence of a formal, written policy adopted by the DeKalb County Board of Education governing

distribution of materials from non-school persons in DeKalb County public schools generally.

It is further CONSIDERED that Defendants be and the same are hereby ORDERED that within thirty (30) days of the date of this PERMANENT INJUNCTION, Defendants shall promulgate a written policy of general application for all DeKalb County public schools, binding upon all school principals, teachers, and other school employees uniformly in each public school in DeKalb County, to govern such distributions in terms of time, place and manner restrictions; and Defendants shall serve a copy of the same upon Plaintiffs' counsel, who, within ten (10) days, shall list any objections, and shall submit the same to this court for its rejection or concurrence. Following court approval, the Defendants shall publish and shall distribute to each school principal a copy of the written policy, with instructions that it shall be followed in each DeKalb County public school.

It is further CONSIDERED that Defendants be and the same are hereby ORDERED to provide *immediately* to the Gideons International representatives who are known by them to have visited DeKalb County schools, or to their designated organizational representative, a copy of this PERMANENT INJUNCTION.

It is further CONSIDERED that Defendants be and the same are hereby ORDERED to inform the organization in writing, *immediately*, that students shall not be harassed with regard to

acceptance or non-acceptance of any Gideon Bibles that may occur while its representatives are situated on public property near the school, (such as the public sidewalk), if students who are approached for distribution are still situated on or boarding school property, and that they shall not throw or pass Gideon Bibles through the windows or doors of DeKalb County school buses or otherwise act in an aggressive manner toward students with regard to any distribution of Gideon Bibles while those students are still situated on school property (for example, standing in line in the school parking lot to board the bus and still under school officials' general supervision and protection, or boarding the public school bus).

It is further CONSIDERED that Defendants be and the same are hereby ORDERED to send a copy of this written notification to Plaintiffs' counsel and to file a copy with the court.

It is further CONSIDERED that Defendants be and the same are hereby ORDERED to follow the exact steps enumerated herein for any non-school group or person other than the Gideons International that wishes to have access to students for the purpose of distributing Bibles, religious tracts, religious literature, or religious paraphernalia.

In the event of a violation of this PERMANENT INJUNCTION, and in the event of aggressive or harassing behavior of the sort proscribed herein, school officials shall take action to cause the violative conduct to cease immediately.

This PERMANENT INJUNCTION DOES NOT prohibit students from distributing religious materials to classmates during non-instructional time, subject to the same time, place and manner restrictions imposed on student distributions of non-religious materials.

(f) Regarding Parties, School Officials, and Potential Witnesses Connected With This Lawsuit. It is CONSIDERED that the Defendants be and the same are hereby ORDERED to direct school officials to intercede to stop religiously based harassment of the minor child, Jesse Chandler, by other students or by any school official or non-school person, if and when they observe it on school grounds or are notified of its occurrence on school grounds, including in the lunchroom of Fyffe School. School officials shall take immediate and prudent protective action when notified of any such occurrence or likely occurrence. Nothing in this provision is intended to chill the rights of students to persuade their fellow students on religious matters or to impose on school officials an affirmative duty to prevent conduct of which they have no notice, but rather to impose an obligation to protect a minor child from oppression where it is observed or comes to the attention of school officials.

It is further CONSIDERED that the Defendants, and each of them, be and the same are hereby ORDERED not to retaliate in any way against the Plaintiffs for filing this lawsuit, or to retaliate in any way against those persons identified in affidavits submitted by the Plaintiffs in this lawsuit as persons who support

this lawsuit or who oppose school-sponsored religious activity in DeKalb County public schools, and specifically Mrs. Whiteside.

7. AND AS FURTHER AFFIRMATIVE RELIEF, IT IS CONSIDERED AND ORDERED THAT DEFENDANT DEKALB COUNTY BOARD OF EDUCATION SHALL:

(a) Distribute copies of the court's opinions and this PERMANENT INJUNCTION to each school principal within the DeKalb County system immediately, with instructions that each such principal inform faculty, staff, and students that the court requires compliance;

(b) Post, or make available, in areas commonly utilized for communicating notices or information to both students and faculty (such as the faculty lounge, bulletin boards, etc.) in each DeKalb County public school, a copy of this PERMANENT INJUNCTION, which shall remain so posted until the same expires;

(c) Maintain in the library available for circulation in each DeKalb County public school a copy of "The Riley Letter" in the form in which it appears as Exhibit A to the parties' Joint Motion to Vacate Trial Setting and Voluntary Cessation Agreement and a copy of the monograph entitled "Religion in the Public Schools: A Joint Statement of Current Law," which shall remain available for circulation until this PERMANENT INJUNCTION expires;

(d) Distribute to the Parent Teacher Organization, Parent Teacher Association, Parent Teacher Student Association, or similar group for parental participation in school affairs, at each DeKalb County public school, a copy of this PERMANENT INJUNCTION and a copy of the court's opinions in this matter, with the following statement attached to it:

> The purpose of the court's injunction is to protect the religious rights and freedoms of students in DeKalb County public schools, to prohibit religious activities from being included in official school activities, and to prohibit DeKalb County public schools from sponsoring religious activities. If you believe that any of the rights and prohibitions specified in the injunction are not being observed at your child's school, you should contact [the court-approved monitor which/who shall be selected in accordance with the provisions of paragraph (g) below; name, address and telephone number shall be provided with this notice].

(e) Conduct a mandatory in-service training session for faculty and administrators in DeKalb County public schools that is reasonably designed to familiarize these school officials with the provisions of this PERMANENT INJUNCTION, the general contours of Establishment Clause and Free Exercise principles as the court has explained them in its opinions in this case, their

rights and duties in connection with the controlling law of church and state relations in the public-school setting, and the general issue of school officials' tolerance for diversity in religious opinion and duty of neutrality in matters of religion when acting in their official capacities. This in-service training shall be conducted during time regularly set aside for such purposes but shall occur during the 1997-98 school year. The Defendants shall not be obligated to conduct an in-service session for new faculty and administrators each year who were not present for the 1997-98 in-service training, but shall be required to direct all such new faculty and administrators to read and acknowledge in writing that they have read the curricular/teaching materials used at the 1997-98 in-service session, a copy of which shall be maintained by the DeKalb County Board of Education for this purpose.

The curricular materials used for this purpose shall be the court's opinions in this matter, this PERMANENT INJUNCTION, and in addition, one of the following: (a) the Anti-Defamation League's "A World of Difference" program; or (b) a similar program of religiously neutral, nonsectarian content selected by the DeKalb County School Board and submitted to the court-appointed monitor referenced in paragraph (g), below, for his, her, or its approval, with a copy served on Plaintiffs' counsel for the purpose of tendering specific written objections within ten (10) days of service. If a nomination is not made by the Defendants within forty-five (45) days of the date of this PERMANENT INJUNCTION, the court will select the

curricular materials, with due regard for the recommendation of the court-appointed monitor.

The DeKalb County Board of Education shall pay the costs of the in-service curricular materials, and;

(f) Cause its counsel to certify to the court, each September 30, December 31, March 31, and June 15, for each school year until further order of the court, that each school within the DeKalb County school system is in compliance with this PERMANENT INJUNCTION, and to send a copy to the person or entity referenced in paragraph (g) below, the State Department of Education, and to Plaintiffs' counsel; and

(g) Within thirty (30) days of the issuance of this PERMANENT INJUNCTION, nominate and submit in writing, *in conjunction with counsel for the Plaintiffs*, three (3) neutral entities or persons, with a description of qualifications, to serve as a monitor for the purpose of insuring compliance with this PERMANENT INJUNCTION. The Parties shall *jointly* arrive at the list of three (3) neutral entities or persons nominated to serve as monitor. The court will appoint one of these three nominees to serve as its monitor. Failing the nomination of a neutral entity or person within thirty (30) days of the issuance of this PERMANENT INJUNCTION, or absent a nominee acceptable to the court, the court will appoint a monitor of its own choosing.

The monitor shall have the power and authority to:

(i) enter any classroom or public school property, school assembly, sporting event, commencement exercise, or school-sponsored or school-initiated event for the purpose of observing and reporting on compliance for the duration of this PERMANENT INJUNCTION; and

(ii) collect complaints regarding any violation of any provision of this PERMANENT INJUNCTION for the purpose of investigating violations and if warranted, reporting them immediately to the court; and

(iii) verify that there are no violations of the provisions of this PERMANENT INJUNCTION during each of the periods referenced in paragraph (f) above, and tender verification to the court within 10 days of the passage of the dates specified in paragraph (f) above; and

(iv) engage in *ex parte* communications with the parties and any persons or entities: (1) in the course of conducting investigations based on complaints; (2) in verifying compliance with this PERMANENT INJUNCTION; and (3) in furtherance of his, her or its responsibilities under this PERMANENT INJUNCTION; and

(v) engage in *ex parte* communications with the court.

The monitor shall be paid, by the DeKalb County Board of Education, a reasonable fee for services and expenses as shall be independently reviewed and approved by the court upon petition

for fees within ten (10) days following the dates specified in paragraph (f) above in connection with monitoring compliance with the provisions of this PERMANENT INJUNCTION.

8. The court shall retain jurisdiction of this matter until further order of the court, with power to enforce the provisions of this PERMANENT INJUNCTION by all means, writs, and remedies available to it, including, but not limited to, the exercise of its powers of contempt for violation of the terms hereof.

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The United States Marshal is hereby DIRECTED to personally serve a copy of this PERMANENT INJUNCTION, together with the FINAL JUDGMENT AND ORDER and MEMORANDUM OPINION, upon Defendants: the Honorable Forrest W. ("Fob") James, Jr., Governor of the State of Alabama; the Honorable William H. Pryor, Attorney General of the State of Alabama; the Honorable William Gray, Legal Advisor to the Governor; the Honorable Ed Richardson, Superintendent of Education for the State of Alabama; and the Honorable Richard Land, Superintendent of the DeKalb County Board of Education.

All costs herein incurred shall be and the same are hereby assessed against the DeKalb County Board of Education, for which let execution issue.

DONE this the 29th day of October, 1997.

/s/ Ira DeMent
UNITED STATES DISTRICT JUDGE

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MICHAEL CHANDLER, *et al.*,

Plaintiffs,

CV 96-D-169-N

vs.

FOB JAMES, *et al.*,

Defendants.

SUPPLEMENTAL OPINION AND ORDER

Pending before the court are several motions and procedural matters that the court finds are due to be addressed.

I. Plaintiffs' November 6, 1997 Motion To Enjoin The Etowah County Circuit Court Proceedings

On November 4, 1997, the Circuit Court of Etowah County issued a temporary restraining order, ("T.R.O."), "to prohibit the implementation of the District Court Permanent

Injunction in this jurisdiction."[1] (T.R.O. at 3.) On November 6, 1997, Plaintiffs filed a "Motion To Enjoin Proceedings In The Etowah County Circuit Court." On the same date, the court issued an Order inviting all parties to respond to Plaintiffs' Motion on or before 2:00 P.M., November 10, 1997.

On November 10, 1997, the Defendant Attorney General of Alabama filed a Response stating that the Etowah County action, styled *Womack v. Etowah County Board of Education et al.*, CV-97-1282-RSM, was voluntarily dismissed by the plaintiffs in that action. A copy of the "Voluntary Dismissal Of Action" was attached to the Attorney General's pleading. In addition, and on the same date, the Defendant Governor of Alabama filed a Response in which he urged dismissal of Plaintiffs' Motion to Enjoin based on the plaintiffs' voluntary dismissal of the proceedings in the Circuit Court of Etowah County.

Based on the pleadings of the Governor and the Attorney General, as well as the notice of dismissal attached to

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[1]The court issued a Permanent Injunction in this cause on October 29, 1997 prohibiting and enjoining : (1) enforcement of Alabama Code § 16-1-20.3 by various state officials, and (2) specific religiously coercive practices in DeKalb County undertaken by school officials pursuant to Alabama Code § 16-1-20.3. The Permanent Injunction, as well as the court's March 12 1997 Memorandum opinion and order, also detail activities that are permitted pursuant to the First Amendment of the United States Constitution, as interpreted by the United States Supreme Court and the Eleventh Circuit Court of Appeals.

the Attorney General's pleading, the court finds that Plaintiffs' Motion To Enjoin the Etowah County proceeding is due to be denied as moot.[2]

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[2]Nevertheless, the court notes that the All-Writs Act, 28 U.S.C. § 1651, and the express exceptions to the Anti-Injunction Act, 28 U.S.C. § 2283, allow federal courts to exercise their discretion to enjoin state proceedings. The court is acutely aware of the principle of comity inherent in our federalist system of government, and the court is reluctant and hesitant to enjoin proceedings in a state court. Federal enjoinment of state litigation is to be the exception, not the rule. *Delta Air Lines Inc. v. McCoy Restaurants Inc.*, 708 F.2d 582, 585 (11 Cir. 1983). The court is quick to note, however, that when a state court in effect asserts the power of appellate review over the judgments and orders of a federal court properly exercising its jurisdiction, and in addition, the state court interferes with the proper and lawful orders of the federal court, the state court is acting without jurisdictional authority, and enjoinment of its proceedings may be proper. *See generally Mitchum v. Foster*, 407 U.S. 225, 242 (1972); *Wesch v. Folsom*, 6 F.3d 1465 (11 Cir. 1993), *cert. denied*, 114 S. Ct 696; *Kelly v. Merrill Lynch*, 985 F.2d 1067 (llth Cir. 1993); *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877 (llth Cir. 1989); *McCoy*, 708 F.2d 582; *Southern Petrol. Corp. v. Harper*, 273 F.2d 715 (5th Cir. 1960); *Jacksonville Blow Pipe Co. v. R.F.C.*, 244 F.2d 394 (5th Cir. 1957).

This court, and ALL courts for that matter, have the duty and obligation to preserve, protect, and defend rights guaranteed to all citizens under the United States Constitution -- conflicting state laws are "null and void," and "without effect." *See Edgar v. Mite Corp.*, 457 U.S. 624, 631 (1982); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (*citing McCulloch v. Maryland*, 4 Wheat. 316, 427 (1819)); *see also* U.S. Const. art VI; *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340-41 (1816); *Ex parte Sizemore*, 611 So. 2d 1069, 1071 (Ala. 1993); *White v. Reynolds*

II. Plaintiffs' November 10, 1997 Motion To Alter Or Amend The Court's October 29, 1997 Permanent Injunction[3]

Also before the court is Plaintiffs' November 10, 1997 Motion To Alter Or Amend The Court's October 29, 1997 Injunction pursuant to Rule 59 of the Federal Rules of Civil Procedure.[4] Plaintiffs filed a Brief in support of their Motion on

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Metals Co., 558 So. 2d 912 (Ala. 1990), *cert. denied*, 469 U.S. 912 (1990). Indeed, the Governor and Attorney General of Alabama recognize this basic foundation of our system of government: "The State of Alabama cannot create, expand, or diminish federal constitutional rights. The State of Alabama must, however, recognize those rights and in conformity with federal law require its citizens to follow those rights. (Governor and Attorney General's Resp. Br. On Constitutionality of Alabama Code § 16-1-20.3 at 5-6, filed February 6, 1997.) As the legal, social, and political dictates of the last half-century have shown, federal courts take seriously this responsibility to protect such rights, and can and will intervene where necessary and proper.

[3]The court retains jurisdiction over this action during the pendency of Plaintiffs' Rule 59 Motion. *See Fed. R. App. P.* 4 (a) (4); *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 59 (1982).

[4] Rule 59(e) of the Federal Rules of Civil Procedure provides:

> (e) Motion to Alter or Amend Judgment. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

Fed. R. Civ. P. 59(e).

The court issued its injunction on October 29, 1997. Accordingly, Plaintiffs' November 10, 1997 Motion To Alter or Amend comports with

the same date. Plaintiffs contend that "specific factual findings in [the court's October 29, 1997 Permanent Injunction] will be of great benefit to the parties." (Pls.' Mot. to Alter or Am. at 1.) In addition, Plaintiffs contend that specific factual findings will satisfy the technical requirements of Rule 65.[5] (Pls.' Br. In Supp. of Mot. to Alter or Am. at 1-2.) Accordingly, Plaintiffs request that the court "make explicit its reasons for granting the injunctive relief it did." (*Id.* at 2.)

Prior to the filing of Plaintiffs' Motion To Alter Or Amend, the court was in the process of formulating and entering specific findings of fact and conclusions of law in support of its October 29, 1997 Permanent Injunction, as well as addressing pending motions before the court. On October 23, 1997, counsel for some of the named Defendants in this action, filed a "Request For Conference Call." In that request, counsel stated that "[a] long-term and respected educator in the DeKalb County School System has been quoted as saying that 'I'm not going to break the law but I want to find out, or I want our

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the requirements of Rule 59 (e). *See Fed. R. Civ. P.* 56(e) and 6.

[5] Rule 65 (d) provides:

> (d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other documents, the act or acts sought to be restrained. ...

Fed. R. Civ. P. 65(d).

attorneys to find out, if a federal judge can do whatever he wants to whenever he wants to.'" (Req. For Conference Call ¶ 1 (quoting newspaper article attached as App. A)) Counsel stated that the purpose of the request was "to clarify whether 'a federal judge has the authority to tell school officials and administrators in DeKalb County how to handle the issue of school prayer.'" (*Id.* at 1.)

Counsel stated to the court that he sought a conference call with the Court and the parties to see what rational procedure could be followed to make sure [the educator] is clear what jurisdiction this Court has over public officials in DeKalb County and what can be done to assure that [the educator] does not engage in action that would put him or others similarly situated in contempt of this Court." (*Id.* ¶ 2)

Counsel's Request reinforced the sensitive and urgent nature of the matter and issues before the court. Prior to his request, the court had issued its March 12, 1997 Memorandum Opinion and Order, ("March 1997 Opinion and Order"), in which the court found that Alabama Code § 16-1-20.3 was unconstitutional and granted summary judgment for the Plaintiffs on that issue. Plaintiffs' Complaint, however, sought not only a declaration that § 16-1-20.3 was unconstitutional, but also relief from the alleged religiously coercive activities of DeKalb County school officials relying on § 16-1-20.3 in support of their actions.

Even after the court's March 1997 Opinion and Order finding the statute unconstitutional, as noted *supra*, as of

October 23, 1997, several motions and issues were still pending, including the issue of the relief necessary to alleviate the alleged religiously coercive activity in the DeKalb County School System. Based on counsel's request, the plethora of pleadings filed by the parties suggesting courses of action and grounds therefor, and the evidence in the record, the court entered its Permanent Injunction on October 29, 1997.[6]

As the introductory paragraph of the injunction notes, it was based on "the court's previous opinions, as well as the record as a whole in this cause." (Permanent Inj. at 1.) The court entered its Permanent Injunction for the reasons articulated above, and herein, and now enters this Supplemental Opinion and Order, including the following "Findings Of Fact And Conclusions Of Law," pursuant to Rule 60(a) of the Federal Rules of Civil Procedure.[7]

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[6] Additionally, in issuing its October 29, 1997 Permanent Injunction, and the "Findings Of Fact And Conclusions Of Law" articulated in this Supplemental Opinion and Order, the court applied the requirements and standards of Federal Rule of Civil Procedure 65, as well as interpretive case law, in determining the propriety of issuing its Permanent Injunction.

[7] Rule 60(a) provides:

> (a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such

III. Findings Of Fact And Conclusions Of Law[8]

In order to assist the court with identifying evidence in the record, the court directed the parties on April 24, 1997, to identify with specificity the evidence in the record at that time

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> mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Fed. R. Civ. P. 60(a).

The court is aware of the filing of notices of appeal by various parties in this action. However, as noted, the court retains jurisdiction of this action during the pendency of Plaintiffs' Rule 59 Motion. *See Fed. R. App. P.* 4(a); *Griggs*, 459 U.S. at 59. Further, the court believes that it is acting within the confines of Rule 60(a). In the alternative, and in addition to the court's issuance pursuant to Rule 60(a), the court finds that Plaintiffs Motion To Alter Or Amend the Court's October 29, 1997 Injunction is due to be granted. The court's specific findings of fact and conclusions of law are articulated *infra*.

[8]The court makes few factual findings in connection with its March 1997 Opinion And Order on the facial validity of Alabama Code § 16-1-20.3 as it believes that matter to be one of law and not one of fact. It finds that the only "fact" not already addressed in its previous opinion that is relevant to statutory construction is whether the persons challenging the statute have standing to do so. The court finds that Michael Chandler is an assistant principal at Valley Head High School, within the jurisdiction of the DeKalb County Board of Education, and the father of the minor child Jesse Chandler, a student at Fyffe School within the jurisdiction of the DeKalb County Board of Education. (*See* Stipulation Number 15 regarding DeKalb County Board of Education's control over these schools.)

and to attach where possible copies of any documentary evidence already in the record, without further argument or embellishment, that was pertinent to dispositive motions.[9] These

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[9] This was necessary because the court had directed that all evidence bearing on factual issues relevant to pending dispositive motions involving DeKalb County be submitted by November 21, 1996. As of that time, however, the record establishes that the DeKalb County Board of Education had not yet responded fully to Plaintiffs' discovery requests and did not do so until after November 21, 1996. When the Plaintiffs received such responses, they submitted them in the order in which they were received, in connection with filings that had nothing to do with discovery *per se*. As a consequence, evidentiary submissions bearing on both dispositive motions and the Plaintiffs' general request for injunctive relief are dispersed throughout the record. For example DeKalb Defendants Answers to Plaintiffs First Set of Interrogatories, apparently served December 3, 1996, were filed with the court as an exhibit to a motion having no relevance to a discovery dispute, as was [DeKalb] Defendants' Response to Plaintiff's Request for Admissions, apparently served on October 10, 1996. DeKalb Defendants' Responses to Plaintiffs' First Discovery Requests, served February 4, 1997 (answering interrogatories not answered on October 10, 1996) are part of Exhibit C to Plaintiff's Supplement to Motion for Sanctions and Opposition to DeKalb Defendants' Request for Time. Evidence of probative value, generally, as it relates to injunctive relief is sprinkled throughout the record and has continued to trickle in through the 1997-98 academic year.

Plaintiffs' filings responding to DeKalb County's May 15, 1997 submission include protest that DeKalb may not offer as "stipulations" matters as to which the Plaintiffs refused to stipulate, specifically those stipulations after September 1996 numbered 75 through 81 proffered by DeKalb. Upon Plaintiffs' motion, DeKalb County withdrew any materials

submissions, pertinent to dispositive motions, were received in May 1997 from the Plaintiffs and from DeKalb County.

However, further evidence bearing on the Plaintiffs' entitlement to injunctive relief against the DeKalb County Board of Education generally has been filed since May 15, 1997, and is detailed in these findings of fact and conclusions of law. This evidence, generally related to religious practices since that time, has not been challenged or controverted by the DeKalb County Board of Education in any way, by affidavit or otherwise. The court finds that such evidence is appropriately received as bearing on entitlement to injunctive relief against DeKalb County and notes that DeKalb County was welcome to submit, at any time, any evidence that might contravene documents, affidavits, and other evidence submitted by the Plaintiffs in support of their claim for injunctive relief, if it had such to offer. All of this evidence is aimed at demonstrating to the court that violations have continued despite the pendency of this lawsuit and despite the court's March 1997 Opinion and Order. Accordingly, the court finds it proper and just to consider all evidence in the record for the purpose of issuing these findings

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that were submitted in May 1997 that varied from evidence that was already in the record.

The court does not rely on any matter that was voluntarily withdrawn by DeKalb upon Plaintiffs' protest that they were untimely attempts to rehabilitate and recast DeKalb County's case after dispositive motions were under submission. The court relies on what the Plaintiffs and DeKalb have evidently agreed are actual stipulations among themselves.

of fact and conclusions of law as they bear upon the Plaintiffs' entitlement to permanent injunctive relief and will do so.

The court specifically notes that the Plaintiffs have brought both a facial and "as applied" challenge and that the DeKalb County Board of Education has specifically adopted the position that prayer and devotionals over the intercom, classroom prayer, prayer at high school graduations, and prayer at student assemblies such as D.A.R.E. ceremonies and events are "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." This is the language of Alabama Code § 16-1-20.3 which this court has previously found to be unconstitutional. Having taken this position in discovery, the DeKalb County Board of Education took the position at summary judgment that the court's decision regarding the statute would resolve most if not all aspects of Plaintiffs' nonfacial challenge.

A. Factual Findings of Pre- and Post-Suit Conduct As To Pervasiveness Of Unconstitutional Conduct In DeKalb County

The court finds the following relevant to the propriety of rewarding permanent injunctive relief:

1. The court finds that school-sponsored religious activity in violation of the Establishment Clause of the First Amendment to the United States Constitution is pervasive and recurrent in the public schools of DeKalb County. The court has examined the degree of scienter of the DeKalb County School

Board and its employees and agents; whether the conduct of the Defendants has been isolated or recurrent; whether the defendants have recognized the wrongfulness of the conduct complained of; and the sincerity of any repentance of the conduct.[10]

The court finds that absent permanent injunctive relief, the substantial likelihood is that the DeKalb County Board of Education and its employees and agents will ignore the court's orders just as it has disobeyed the rulings of higher courts for years -- before and after Alabama Code § 16-1-20.3 was enacted and before and after the Eleventh Circuit outlawed prayer over the public-address system at school-sponsored sporting events. Indeed, the record in this case suggests to the court that its March 1997 Opinion and Order has been unobserved since it was entered. Although the court did not at that time make any specific orders to DeKalb County regarding graduation prayer, prayer over the public-address system, and other challenged matters, the court stresses that it drew that opinion from existing controlling case law and did not pronounce "new" general Establishment Clause law.

As recently as October 23, 1997, counsel for DeKalb County filed a "Request for Conference Call," which states that certain educators wanted clarification on the question of

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[10]*See United States v. Laerdal Mfg. Corp.*, 73 F.3d 852 (9th Cir. 1995). *See also Newman v. Alabama*, 683 F.2d 1312 (11th Cir. 1982)(discussing substantial likelihood of recurrence).

whether "a federal judge has the authority to tell school officials and administrators in DeKalb County how to handle the issue of school prayer" and "if a federal judge can do whatever he wants to whenever he wants to." The pleading specifically expresses the concern of DeKalb County counsel that the Sylvania High School principal and "others similarly situated" would be found by the court to be in contempt. Appended to the filing submitted by the DeKalb County Board of Education is a newspaper article titled, "Principal questions judge's authority in prayer lawsuit." Also appended to that filing is a Letter to the Editor over principal Gary Carlisle's[11] signature which makes plain that Mr. Carlisle believes that only elected officials, and not the judiciary, may traffic in the First Amendment's religion clauses.

Mr. Carlisle's very recent letter states, "I will resist government without representation" in obvious reference to the judiciary and judicially imposed proscriptions on state-sponsored prayer. The court finds the Carlisle letter suggestive of a motive to violate the court's orders and to continue with the status quo of unconstitutional conduct in DeKalb County public schools. (Nor is this the only such press clipping with which the court has

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[11] There is confusion as to the spelling of this school principal's name throughout the record. Mr. Chandler has spelled it "Carlyle," counsel for DeKalb County has spelled it "Carlyle," the reporter for the Fort Payne Times Journal spelled it "Carlyle," and the "Letter to the Editor" submitted to the court is signed "Gary Carlisle, Principal, Sylvania High School." It is apparent that all parties refer to the same individual and identify him as the principal of Sylvania High School.

been deluged in this case.) The court can discern in this evidence no recognition of the wrongfulness of school-sponsored religious activity, sees scienter in the vow to "resist" judicial action, and discerns no repentance of past unconstitutional conduct. The court does not mean to single out Mr. Carlisle for censure. The court finds this statement emblematic of DeKalb County school officials' historical attitudes – judging from the record before the court, this statement typifies an attitude. The court references it specially because it is so recent.

The court also finds relevant that in Spring 1996, all Parties executed an agreement that DeKalb County schools would not undertake any practices alleged by the Plaintiffs to be unconstitutional pending this court's determination of their constitutionality. This agreement, styled "Joint Motion to Vacate This Court's Order and Agreement of Voluntary Cessation of Certain Activity Pending this Court's Decision" (hereafter "Joint Motion"), was filed with the court in March 1996.

That document, in the court's view, constitutes a representation of the parties *to the court*, even if the court could not or would not enforce a voluntary agreement among counsel as Plaintiffs requested.[12] However, the fact that the DeKalb

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[12] The court notes that as a matter of law, voluntary cessation is not a defense to unconstitutional conduct. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). Jurisdiction may abate if there is no reasonable expectation the alleged violations will recur and if intervening events have completely and irrevocably eradicated the effects of the alleged violations.

County School Board would represent to the court and other Parties that challenged conduct would cease pending the court's final determination -- and then continue with such conduct -- persuades the court of the pervasiveness of school-sponsored religious activity in DeKalb County and concomitantly, of the need to assure that injunctive relief can be enforced that will be effective to deter unconstitutional conduct in the future. Had the parties not made that agreement, the court would have proceeded with dispatch on the Plaintiffs' motion for preliminary injunction[13] and would have enforced any orders pursuant thereto. Those orders would have been consistent with the court's March 1997 Opinion and Order on the constitutionality of Alabama Code § 16-1-20.3, finding that the statute violated both the Free Exercise and Establishment Clauses under the precedential cases.

The Joint Motion promised that the school board

Hall v. Board of Sch. Comm'rs of Conecuh County, 656 F.2d 999 (5th Cir. Unit B 1981). The court concludes that this is plainly not the case here and that violations have continued to occur during the pendency of this lawsuit.

[13]The court had initially consolidated the preliminary injunction with the hearing on the merits. The Defendants' action had the effect of forcing forbearance of the hearing on the Plaintiffs. At the Parties' request, in the terms of the Joint Motion the court vacated its Order setting an immediate hearing on the merits and set a trial date. In the interim, dispositive motions were filed as to issues specific to DeKalb County and the parties agreed to submit the facial challenge to the statute on briefs. (*See* Order of February 28, 1996 vacating hearing date.)

Defendants, the DeKalb County Board of Education, and the Talladega City School Board, would cease:[14]

> "prayers, whether student-initiated or otherwise, at school-sponsored sporting events that use public address systems;"
>
> "prayers and devotionals, whether student-initiated or otherwise, at school-sponsored assemblies, held during the school day. . . except that noncurricular clubs may meet during noninstructional time;"
>
> "prayers and devotionals during classroom time during the school day; except that students have the right to pray, individually and nondisruptively, except when required to be actively engaged in school activities, *e.g.*, students may not decide to pray just as the teacher calls on them;"

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[14]Both Governor James and then-Attorney General Sessions disavowed any knowledge of the actions of school officials in DeKalb County in the Joint Motion. The Governor asserted therein that "he is not able to determine what activities may have heretofore been engaged in by other defendants, *i.e.*, school officials or agents and school boards." The Attorney General asserted that the activities in DeKalb County were "purely local in nature." (Joint Motion, ¶¶ 4, 5.)

"distribution of religious literature, including Bibles and invitations to religious events, to students by school officials or non-school persons during the school day on school premises; however, students and non-school persons have the right to distribute religious literature on school premises during noninstructional time, subject to the same reasonable time, place and manner restrictions imposed on the distribution of all non-school literature;"[15]

"prayers and devotionals, whether student-led or otherwise, at school-sponsored graduation ceremonies;"

"the meetings of student Bible clubs, including the meetings of the Fellowship of Christian Students, occurring during instructional time; however, all noncurricular student clubs may be allowed to meet pursuant to the Equal Access Act during noninstructional time."

(Joint Motion, ¶ 6 and subparts.)

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[15]The absence of any policy of general applicability in DeKalb County public schools as to time, place, and manner restrictions is admitted by Weldon Parrish in his affidavit executed October 30, 1996.

In exchange for this agreement not to do what was sued on here until the court ruled on the Plaintiffs' constitutional challenge, the Plaintiffs voluntarily "agree[d] not to seek preliminary injunctive relief in reliance upon defendants' agreement to cease the activities. . . pending a determination of their constitutionality." (Joint Motion, ¶ 8.)

Plaintiffs' "reliance upon defendants' agreement to cease the activities" was not misplaced as to the Talladega City Defendants. The Plaintiffs brought no complaint to the court concerning Talladega's performance on its promise to them and its representation to the court. The Plaintiffs' claims against the Talladega Defendants were resolved through a consent decree, over the objections of the Governor and the Attorney General which both the Plaintiffs and the Talladega Defendants urged the court to overrule in both separate and joint filings. There have been no complaints of violations of that consent decree.

In contrast, the Plaintiffs have produced a mound of evidence of DeKalb County's breaches of the Joint Motion, which indicates to the court DeKalb County's predisposition to break promises. The court assigns weight to this, not because it has any inclination to enforce the terms of a voluntary agreement among counsel, but because it persuades the court of the depth of resistance toward ceasing unconstitutional practices on the part of the DeKalb County School Board and of the pervasiveness of school-sponsored religious practices in DeKalb County, that do not cease despite express agreement, the pendency of a lawsuit, and the court's earlier March 1997

Opinion and Order. If DeKalb County school officials persist in conduct alleged to be unconstitutional while this suit is pending and despite their promise not to persist, this court could not expect its Orders to be obeyed, any more than the Eleventh Circuit and the United States Supreme Court have been obeyed, absent an enforceable enjoinment of specific practices that are demonstrably violative of law.

Shortly after the Joint Motion was signed, Michael Chandler tendered a Declaration informing the court that he attended the 1996 commencement at Sylvania School and witnessed a "Historian Address" delivered by a student that ended, "In His name we pray, Amen." Exhibit A to that Declaration is a copy of the Sylvania School program on which is printed an entry for "Historian Address." Mr. Chandler also submitted copies of the programs for various other commencements in DeKalb County public schools which list invocations and benedictions given by students and copies of the programs for various other assemblies and school-sponsored events which indicate that devotions were given. Several of these documents show that DeKalb County public schools printed the commencement and baccalaureate services on the same program and that school principals took part in the baccalaureate services by way of introducing ministers. (All of these documents have been authenticated by the DeKalb County School Board in the discovery process.)

Mr. Chandler also testified in that Declaration that a Bible reading was given by a student at a compulsory assembly

at Fyffe High School while Jesse Chandler was in attendance. Mr. Chandler testified in this Declaration that he complained to the principal of Fyffe School about violations of the Parties' agreement and was told in response that the principal knew nothing about the Joint Motion and that he had not been informed by the DeKalb County Superintendent's office of the Parties' agreement. Other evidence in the record indicates that an individual school board member, Willard Israel, indicated not only that he would not comply with any agreement, but that the agreement was a matter between the attorneys and not the Parties. (Ex. B to Pls.' Supp. to Mot. for Sanctions and Opp. to DeKalb Defs.' Req. for Time.) DeKalb County has never challenged the Plaintiffs on any of these matters or offered any evidence to contravene Mr. Chandler's testimony as to the matter of the Bible reading/student devotional at Fyffe and school officials professed ignorance of, the terms of the Joint Motion.

Mr. Chandler offered a further Declaration dated November 10, 1996, in support of the Plaintiffs' November 21, 1997 Motion to Enforce the Joint Motion. A videotape made by Mr. Chandler depicting (among other things) prayer over the public-address system at a Geraldine High School football game on October 19, 1996 was submitted as Exhibit B to the Declaration dated November 10, 1996.[16] The court has viewed

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[16]That videotape also shows student-led prayer over the microphone at graduation. It is of poor quality, but it is clear what is depicted. Mr.

the videotape, and considers it powerful evidence of DeKalb County Schools' defiance of Eleventh Circuit law as pronounced in *Jager* almost a decade ago as well as evidence of DeKalb County's disregard for the proceedings pending here. The videotape features one of the intervenors,[17] a minor at Geraldine

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Chandler testified in his Affidavit of February 1 that he had videotaped graduation prayers and pre-game prayers prior to the filing of this lawsuit.

The court reiterates that there are two videotapes, one including pre-suit graduation exercises and pregame prayer in a series of short clips and ending with the October 19, 1996 prayer over the public-address system by Ms. Sexton at Geraldine High School, and the other depicting the 1997 graduation prayer at Collinsville, Plainview, and Sylvania as well as classroom prayer at Geraldine. The videotape filed November 21 with the Motion to Enforce includes the pre-suit graduation prayer as well as the post-suit October 1996 football game prayer. The first videotape is Exhibit B to the Plaintiffs' Motion to Enforce; the second, showing the 1997 graduation prayers, is Exhibit B to the June 9, 1997 Declaration of Michael Chandler. (*See* Affidavit of Michael Chandler, Feb. 1, 1996, at ¶¶ 6, 9; Plaintiff Michael Chandler's Designation of Exhibits and Materials already in the Record for Rule 56 Purposes, n.4 (filed November 21, 1996).)

[17]The intervenors were allowed in for the limited purpose of *amicus curiae* participation. The court accepted affidavits from them. Had they intervened timely, when this suit was filed or before summary judgment submissions and the court's March 1997 opinion, the court would have granted intervention. The intervenors' affidavits do not merit separate or extended discussion. Bible Clubs may meet consistent with the Equal Access Act; religious jewelry may be worn; students may wear "Victory Line" t-shirts of the sort depicted in Exhibit C to Plaintiffs' Opposition to Motion to Intervene or in the Alternative, Motion to Strike, consistent with school policy; students may organize the "Meet Me at the Pole" event; and may

High School, leading the prayer and discussing her action with the news media. (*See also* Exhibit C to Plaintiffs' Opposition to motion to Intervene.)

Mr. Chandler's November 10, 1996 Declaration also indicates that devotionals took place in elementary schools after the Joint Motion was signed and that Bible Club students at Valley Head High School were excused from class on May 24, 1996 to distribute information about baccalaureate services to each classroom. Mr. Chandler also testified that members of the band were required to attend the baccalaureate service at Valley Head High School. Additional programs from 1996 school graduations were appended as exhibits to this Declaration. Programs showing the same practice before the filing of this lawsuit were appended to the Complaint, and the Plaintiffs had alleged their illegality. Even under scrutiny as to these practices, school officials in DeKalb County did not desist.

Yet a further Declaration Under Penalty of Perjury, executed June 9, 1997, was tendered by Mr. Chandler describing events at May 1997 graduation ceremonies and prayer in the classroom at Geraldine School. Once again, some

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generally do all the things the court discussed at pages 23 and 24 of its earlier opinion -- and more. This court does not undertake to give a complete catalog of possible free exercise rights. The intervenors' position is apparently that the Free Exercise Clause negates the Establishment Clause. The court has already rejected that position.

of these events were captured on videotape.[18] The videotape shows that there definitely is prayer at the Plainview High School graduation in the manner in which Mr. Chandler's June 9, 1997 Declaration describes it. In addition, the court has observed that there definitely is prayer at a graduation ceremony which ends by invoking the name of Jesus, as ¶ 3 of the Declaration recites regarding Sylvania High School.

At Sylvania High School, Mr. Chandler testified in this Declaration, "Just as occurred last year under the guise of a 'Historian Address,' as I swore in my previous Declaration, the 'Greetings' by the class 'historian' were explicitly a prayer. The 'historian's' prayer ended in Jesus' name and was offered over the public-address system. Gary Carlyle, the principal, was seated in close proximity at the time of the prayer, as the videotape accompanying this Declaration depicts. I believe that the phrase 'historian address' or the designation of a student as 'historian' is Sylvania's code for prayer at graduation." This lawsuit was pending at the time of both the 1996 and 1997 Sylvania graduations described.

Mr. Chandler further testified in his June 9 Declaration

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[18]The prayer in the classroom, according to the Declaration of the reporter who observed and filmed the classroom prayer which has been submitted to the court on videotape, was in the sixth-grade classroom prior to the lunch period. Jim Melchiorre's Declaration establishes that the teacher announced lunch and the students stood, recited the Pledge, and prayed *en masse*. Mr. Melchiorre testified that he was told by student/intervenor Leslie Sexton to go to this particular classroom to film.

that at Collinsville High School in May 1997, for example, he witnessed both a benediction and an invocation. He testified that at Plainview High School, a student walked to the microphone to announce an invitation to prayer and walked away from the microphone to lead the prayer during the time listed on the school program as the "Special Music" segment of the ceremony. At Valley Head High School, he testified, a student recited the Lord's Prayer.

Once again, the June 9 Declaration was accompanied by various programs from various ceremonies evidencing benedictions, invocations, and baccalaureate exercises listed on the same program as the graduation exercises, just as was the affidavit that accompanied the Complaint.

In the June 9 Declaration, Mr. Chandler also testified that Jesse Chandler has been harassed by schoolmates at Fyffe School:

> Fyffe School students are led to lunch every day and cannot leave the campus for lunch; the school has a closed-campus policy. In approximately October 1996, Jesse began experiencing harassment in the lunchroom. I am aware that the agreement signed by my lawyer and DeKalb's lawyers states that school officials will intercede to stop harassment based on religious belief.[19] Virtually every day between

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[19]*See* Exhibit A to Joint Motion.

October 1996 and April 1997, approximately 175 out of 200 students in the lunchroom stood up and prayed aloud when Jesse entered the lunchroom. On one or more occasions, a student would announce on Jesse's arrival, 'one, two, three, pray.' I discussed this situation about two weeks after it started happening with principal Danny Ashley, who admitted to me that this was occurring in systematic fashion.

I also complained to Superintendent Parrish. Both Ashley and Parrish told me that lunch time was noninstructional and students could do whatever they want. I do not challenge the right of small groups of students or individual students to pray nondisruptively at lunchtime. However, a mass, audible prayer offered specifically because my son has entered the lunchroom is in my view harassment that school officials should intercede to stop, particularly in view of the captive- audience problem. DeKalb County agreed that its school officials would intercede to stop harassment based on religion and has not done so despite my requests and the requests of my counsel.

. . . I do not want my son harassed every day in this way and for school officials to shirk their

> duty to stop the harassment. The students' behavior has been organized and vindictive. In April, I told Jesse to take his lunch to my wife Barbara Chandler's classroom and to eat his lunch there to escape the harassment. I did so around the time that Jesse told me that the students were going to offer a Bible reading at lunch because they had heard I was going to be on campus that day. Technically, what I told my son to do is a violation of school policy, because he is supposed to be in the lunchroom during the lunch period. However, I felt that I must do something to prevent his being further stigmatized based on this lawsuit.

Two further Declarations of Mr. Chandler were submitted to the court in September 1997, during this school year. One, as amended, establishes that Mr. Chandler witnessed a prayer over the public-address system at a football game with the school principal in attendance. The second September 1997 Declaration offers testimony that at Valley Head High School, on September 12, 1997, the public-address system was used at a high school football game for announcing that "'a couple of moments of prayer' would be had following the National Anthem."

All of these activities took place or continued to take place after the court had issued its March 1997 opinion and Order, which makes express reference to the Eleventh Circuit's

specific proscription of prayer over the public-address system in *Jager* at pages 9 and 10.

There is further evidence in the record predating the court's March 1997 Opinion and Order. In his affidavit submitted with the Complaint, Mr. Chandler testified that the 1995 DeKalb County graduation ceremonies and other year-end activities included prayers and devotionals. Mr. Chandler testified in this affidavit that Crossville High School used clergy for this purpose; Exhibit 1 to this affidavit demonstrates that the Reverend Bob Coleman gave an invocation and benediction at Awards Night May 18, 1995 and that the Reverend Wes Garner gave an invocation at graduation. A Plainview School Announcement is discussed in Mr. Chandler's affidavit and is Exhibit 2 thereto; Mr. Chandler testified that students were excused from class to attend baccalaureate practice in May 1995. Exhibit 2 states, "May 19 - 3rd period - (Friday) - BACCALAUREATE PRACTICE - This will take only one period. You will have regular classes 4, 5, 6, 7 periods." Exhibit 2 also indicates that senior-class members should get any materials for inclusion on the graduation program, such as "singers, songs, prayers" ready for submission to the printer of the school's graduation program.

Exhibits 3, 4, 5 and 6 to the affidavit, all from May 1995 before the lawsuit was filed, demonstrate that the religious service is listed with the graduation program -- just as was the case after the lawsuit was filed in both 1996 and 1997. The court finds that the pending lawsuit made no difference to this

intermingling of the private religious service with the school-sponsored graduation ceremony; the practice was the same in 1995 as in 1996 and 1997.

Mr. Chandler testified in his February 1, 1996 affidavit, "Since 1985, through the Fall of 1995, I have witnessed pre-football game prayer at Valley Head, and at Geraldine, Fyffe and Plainview games." (Apparently, Mr. Chandler was complaining about this practice even before the Eleventh Circuit had issued a ruling directly on point.) Mr. Chandler testified in this affidavit that Superintendent Weldon Parrish had told him that prayer at school football games was a tradition that would not be stopped. Mr. Chandler attached to his affidavit as Exhibit 7, an August 2, 1989 newspaper article quoting Superintendent Parrish as stating that school principals could have prayer over the loudspeaker at high school football games if they wished, in accordance with tradition, despite the Eleventh Circuit's ruling to the contrary. In ¶ 20 of its Amended Answer, the DeKalb County Board of Education admits that Superintendent Parrish had referred to prayer over the public-address system at high school football games as a tradition.[20]

Mr. Chandler testified in his affidavit that he wrote a letter of complaint to Superintendent Parrish on August 3, 1989 regarding the newspaper article of August 2, 1989 and the quotations attributed to school officials: The letter expresses Mr. Chandler's concern that school officials had expressed that

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[20]The court notes that "tradition" contemplates ongoing, repetitive conduct.

they would disobey the law and asks Superintendent Parrish to "consider adopting [a] board policy stating that all employees will obey the law and respect the differences in religion that exist in this country." That letter is appended as Exhibit 9 to Mr. Chandler's affidavit and is authenticated in his affidavit. Mr. Chandler testified in his affidavit that he received no response. In their Amended Answer, ¶ 20, the DeKalb County Defendants "admit plaintiff Chandler wrote to Superintendent Parrish and the DeKalb County School Board expressing his concern over school sponsorship of religious activities." They also admit the "remaining allegations" of paragraph 20, which include the allegation that Mr. Chandler received no reply to his letter of complaint.

All of this undisputed evidence about events and practices before this lawsuit was filed, as well as the undisputed evidence of ongoing school-sponsored religious activities after the Parties made representations to the court through filing their Joint Motion and after the court's March 1997 Opinion and Order, indicate to the court that injunctive relief is necessary. DeKalb County has disregarded its representations to the court and the Plaintiffs, has ignored the obvious import of the court's March 1997 Opinion and Order, and has continued, in action repetitive of or similar to conduct before the lawsuit was filed, to: (a. permit mass vocal prayer in the classroom at Geraldine School, when the teacher announces the lunch period; (b) use the public-address system to deliver prayer and to call for prayer prior to high school football games at several schools; (c) offer

student-led prayers at graduation ceremonies, among them prayers presented in the guise of "historian addresses" two years in a row; (d) offer student-led prayer at graduation that is decidedly Christian and therefore sectarian; (e) intermingle private religious service with official graduation exercises; and (f) refused to halt harassment based on religion where they have notice of it and to take effective action to deter violations by students, school officials, and nonschool persons.[21] The conduct is certainly recurrent, and almost certain to remain so absent an injunction.

This court has been besieged by motions and requests for clarification of its March 1997 Opinion and Order, which the court thinks sufficiently clear not only as to the court's ruling that Alabama's most recent school-prayer statute is facially unconstitutional, but as to all the case law demonstrating why that is so that has been controlling for some time. This court indicated in its March 1997 Opinion and Order that it rejected the Fifth Circuit's rule on student-initiated graduation prayer as inconsistent with *Lee v. Weisman* and with the Eleventh Circuit's holding, rationale, and opinion in *Jager v. Douglas County*. As recently as October 23, 1997, DeKalb County again requested "clarification" from the court as to whether the federal court "has the authority to tell school officials in DeKalb County how to handle the issue of school prayer."

Finally, the court notes that Plaintiffs have represented in several filings that they have on several occasions proffered a consent decree to the DeKalb County Defendants. (*See*, e.g.,

Supplement to Motion for Sanctions and Opposition to DeKalb Defendants' Request for Time, ¶ 3 & n.3.) The DeKalb County Defendants have consistently taken the position that the Plaintiffs' challenges to their specific practices would be mooted by the court's ruling on the statute. The DeKalb County Defendants' discovery responses take the position that challenged conduct was undertaken pursuant to the statute. (*See* DeKalb Defendants' Answers to Plaintiffs' First Set of Interrogatories, Responses 5, 9, 11 and 12, responding "Yes" to interrogatories inquiring whether this conduct; including a teacher's asking for student volunteers to pray was "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions.") The DeKalb County Defendants argued that summary judgment should be denied because the court's opinion on the statute would moot most if not all issues as to them. In other words, DeKalb argued that a facially unconstitutional statute would not shield it from constitutional violations avowedly undertaken pursuant to it, and that a ruling of facial invalidity would necessarily mean that myriad activities undertaken under the statute were unconstitutional. Accordingly, when the court struck the statute, it ordered DeKalb County, in conformity with, DeKalb County's own expressed views, to sit down with the Plaintiffs and attempt resolution of nonfacial claims.

The response to court-ordered settlement discussions between the Plaintiffs and DeKalb County was still rejection of any settlement despite DeKalb's own argument that a facial

ruling would be dispositive of other claims. It is apparent to the court from the evidence, and even from recent DeKalb county filings, that unconstitutional conduct will not be *willingly* stopped by elected school officials. The court notes this not to chide, but by way of explaining why it believes that DeKalb County school officials are unlikely to take steps to cause popular, but illegal, activity to cease. The court thinks it apparent from the long history of pregame prayer, from the admission that Superintendent Parrish believes it to be a tradition, and from the recent necessity of a conference call to discuss a high school principal's expressed views (at the request of his counsel on the representation that clarification of the March 1997 Opinion and Order was necessary), that court-ordered terms are the only means of relief.

If DeKalb County has specifically contended throughout this litigation that student-initiated prayer at football games, assemblies and events, and at graduations was done pursuant to the statute, and this court ruled in March 1997 that the statute was unconstitutional, at a minimum, this conduct pursuant to the statute should have ceased.

Where the court finds that state officials are unlikely to enforce the terms of a state statute that has been struck, it may order only declaratory relief and withhold injunctive relief.[21] Here, however, officials flagrantly defied the Eleventh Circuit

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[21] *See* Exhibit A to Joint Motion; footnote 16 of court's March 1997 Opinion and Order.

rule on prayer over the public-address system and continued to do so after this lawsuit was filed. Here, even after this court's March 1997 Opinion and Order, "student-initiated" prayer continued with the use of the school facilities and in particular the public-address system.

In view of the history of pervasive religious activity in the schools operated by the DeKalb County School Board, the court determines that an injunction of the DeKalb County School Board is necessary. It is not in every jurisdiction that one hears of organized, school-sponsored prayer in the classroom more than three decades after *Schempp* and *Engel*. Yet here, according to DeKalb's own discovery responses. stipulations, and Amended Answer, Jesse Chandler's teacher Ms. Carroll "may have selected devotionals for students to read," "asked for volunteers to lead prayers," and permitted prayer. (Stipulation 46; Amended Answer, ¶ 16.)[22] Moreover, after this lawsuit was filed, classroom prayer at Geraldine School has been videotaped, and the manner in which it proceeds is upon the teacher's announcement of the lunch period. (*See* Affidavit of Jim Melchiorre.) The manner in which it proceeds is out loud and in unison.

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[23]Admissions such as these support Plaintiffs' argument in their briefs that ostensibly "student-initiated" activities hazard the possibility that school officials will simply delegate religious activity to students, who act as their surrogates. On this basis alone, in conjunction with evidence such as this, a court could strike the statute or the practice under *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

In view of this and the above, the court finds that the monitoring it orders by its injunction is appropriate and necessary. It has been demonstrated to the court's satisfaction that simple declaratory relief would, in DeKalb County, be no relief at all.

The court further finds that in-service training is warranted as a necessary component of injunctive relief. The evidence in the record indicates that school officials apparently see no error in failing to curtail organized classroom prayer; in allowing the public-address system to be used for prayer at school-sponsored sporting events; in allowing not only student-initiated prayer at graduation, but allowing explicitly Christian prayer at graduation ceremonies; and in failing to adopt a policy of uniform applicability for distribution of materials by nonschool persons that would have obviated the need of the court's ordering them to do so, even though the court admonished DeKalb County at the pretrial conference that the absence of such a policy is a serious matter. All of these things suggest to the court a disregard for the rights of students and parents who might not be members of the majoritarian religion or who might believe that the United States Supreme Court has correctly held for decades that the state may not favor religion, even over-nonreligion.[24]

Most importantly, the court is disturbed by the

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[24]*See County of Allegheny*, 492 U.S. at 590-91; *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985).

uncontroverted testimony regarding Jesse Chandler. Even if Michael Chandler's November 10, 1996 Declaration testifying that all students are required to attend homeroom periods and that DeKalb County schools are closed-campus schools, so that students may not leave the campus during the school day without permission were controverted, this court still could not find that the lunchroom situation described in the June 9, 1997 Declaration at Fyffe School could continue. The court repeats what it said in footnote 16 of its March 1997 Opinion and Order: disruptive, aggressive, harassing speech by students, even in the lunch setting, is not protected. Michael Chandler's testimony that both the school principal and Superintendent Parrish had notice of the situation and replied that lunch time was "noninstructional" time so they would not intercede convinces the court of the need for brief, one-time-only, in-service training.

The court, by the terms of its injunction, leaves the selection of the curriculum to DeKalb County subject to the court's approval. While the court has suggested a program, its suggestion is for illustrative purposes only and the court would approve any reasonable program of neutral and objective content. All of the matters discussed above, as well as the matters discussed below with reference to the Plaintiffs' dispositive motions, demonstrate to the court that a one-time, in-service training would be of great benefit in clarifying the law for those who must abide by it. The court does not require such in- service training repetitively or for all new hires but requires

merely that educational materials be maintained in a form accessible to persons who are hired after the court-ordered in-service training is conducted.

The court finds that this injunctive relief will clarify the law for agents of the DeKalb County School Board and that general instruction in the tolerance of religious diversity that underlies the Establishment Clause's proscription of religious favoritism is necessary and is frankly responsive to DeKalb County's oft-requested pleas for more clarification of the court's March 1997 Opinion and Order. The court expects such training to assist school officials in complying with the injunctive provision regarding school officials' treatment of situations such as Jesse Chandler's lunchroom incident.

The court finds that its provisions for publicizing its injunction are reasonable and not onerous.

The court finds that the nonharassment provision is a general aspect of injunctive relief in cases such as employment discrimination, where Defendants often control the destiny of suing employees and of their witnesses. The court finds the present situation analogous. The court finds that specific provision is warranted as to Jesse Chandler particularly by the fact of Jesse Chandler's experience at Fyffe School. The court finds that specific provision as to Mrs. Whiteside is likewise warranted due to gratuitous references in briefs and affidavits. The references in Donna Taheri's affidavit and Steve Bowman's affidavit, for example, appear to the court to suggest that these persons, DeKalb County Board of Education employees, have

formed the opinion that Mrs. Whiteside is opposed to school prayer and therefore "trapped" Mr. Bowman into singing a gospel song at a school-sponsored assembly by requesting that he sing a song.

As to all references to Alabama Code § 16-1-20.3 and any regulations implementing it, the court reiterates its conclusion of March 12, 1997 that the statute is unconstitutional as measured against both the Free Exercise and Establishment Clauses. The court expressly found that "non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benedictions" as referenced in the statute ran afoul of the test of *Lemon v. Kurtzman*, 403 U.S. 602 (2971). The court found state sponsorship and endorsement of religion in students' undertaking prayer, invocations, or benedictions using the state's facilities and machinery. Certain conclusions obviously flow from that; one is that conduct that fits the description of the unconstitutional statute is similarly unconstitutional. The court expressly so finds.

B. Evidence And Conclusions Upon Dispositive Motions

The court now focuses on the evidence specifically related to dispositive motions in this case, to the exclusion of evidence of continuing violations of law past the time of the filing of those motions, that the court has reviewed above and which demonstrate to the court that declaratory relief alone would be insufficient.

The court notes again that the DeKalb County Defendants have responded to Plaintiffs' interrogatories about

devotionals at D.A.R.E. assemblies; faculty solicitation of student volunteers to lead classroom prayer; devotionals over the intercom; and graduation invocations by students, with the response that such activity was undertaken as "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." (*See* Plaintiffs' First Discovery Request to DeKalb Defendants Requests 5, 9, 11, 12, DeKalb Defendants Answers to Plaintiffs' First Set of Interrogatories, "Yes" to Requests 5, 9, 11, 12.) The court notes again that it was DeKalb County's position at summary judgment that the court's ruling on the statute would resolve most of these challenges -- the court finds that the only exception to this position taken by DeKalb County exists with regard to Gideon Bible distributions.

The court has reviewed the Parties' final filings in response to the court's April 24, 1997 Order from the bench as an aid to its findings, but these filings are aids only and may not reflect all admissible evidence. Findings follow:

Stipulations resolve some issues.[25] Thus the court finds

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[25]The court notes that its Order to the Parties to stipulate to such matters as they could among themselves, apparently produced delay and confusion due to the multiplicity of Parties. In ordering the Parties to stipulate to matters as to which admissions and agreement could be made, the court intended for Parties to use their common sense as to deciding to which Parties a given stipulation is obviously addressed. The court relies on stipulations between the Plaintiffs and DeKalb County for all matters directly affecting DeKalb County and factual allegations specific to it. The court notes that the Plaintiffs have not attempted reliance or attributed any evidentiary

"[p]laintiff' Michael Chandler is a resident of DeKalb County, Alabama and is the father of Jesse Chandler, a seventh-grade student born in 1983, who attends Fyffe School." (Stipulation 1.) The court further finds that "plaintiff Michael Chandler is an employee of the DeKalb County Board of Education who works at Valley Head School, where he teaches class and serves as assistant principal and as guidance counselor. In this capacity, plaintiff Michael Chandler is required to attend various school-related activities and events, including school-related student assemblies, compulsory and non-compulsory school-related sporting events, school-related graduation or commencement ceremonies and other school-related student events." (Stipulation 2.) The court further finds that Michael Chandler is required to attend home football games in his capacity as assistant principal at Valley Head High School. (Amended Answer, ¶ 19.) The court further finds that "[i]n his capacity as assistant principal at Valley Head, Michael Chandler is required to attend graduation/commencement ceremonies at the school." (Stipulation 56.)

The court finds that "[t]he DeKalb County Board of Education operates all public schools within DeKalb County, including Valley Head School, Plainview School, and Fyffe

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significance to the filings of the Governor in this regard. Nor does the court, which finds that the Governor may not contravene or qualify the Stipulations of DeKalb County by means of his own stipulations. The court notes that stipulations would be meaningless as among Parties intending to be bound by them if other Parties could effectively veto them.

School, which schools have students in grades K through 12." (Stipulation 15.)

The court finds that "[a]ll DeKalb County high school home football games or other athletic events take place under the general direction or control of the DeKalb County Board of Education, with individual games occurring under the immediate supervision of each home-team principal. All home football games and other athletic events take place on public school-owned or leased property. Public school officials or their agents control access to the public-address systems at all football games or other athletic events, including granting permission for its use." (Stipulation 51.) The court finds that "[i]n 1994 and 1995, prayers and devotionals, as well as the Pledge of Allegiance, have been offered over the public-address system by students and clergy at DeKalb County high school football games." (Stipulation 53; *see also* Stipulation 55.)

The court finds that "graduation/commencement exercises are school-sponsored events for which school principals and other school officials make the ultimate decisions as to the format of the ceremony." (Stipulation 58.) The court further finds that "[t]he graduation/commencement ceremony is considered an integral part of the school educational program and of each student's tenure at school. Graduation/commencement ceremonies are community-wide events frequently attended by non-graduating students." (Stipulation 60.)

Exhibit B to the Plaintiffs' Motion to Enforce Voluntary

Cessation Agreement, filed November 21, 1996, is a videotape accompanied by a Declaration under Penalty of Perjury of Michael Chandler executed November 10, 1996. The videotape depicts graduation prayer over the public-address system filmed by Mr. Chandler which occurred prior to the filing of this lawsuit and also depicts pre-game prayer over the public-address system at a Valley Head football game that occurred prior to the filing of this lawsuit, on September 1, 1994, according to the uncontroverted affidavit of Michael Chandler. (*See and compare* Aff. of Michael Chandler, ¶¶ 6, 9; Ex. B to Plaintiffs' Motion to Enforce, Nov. 21, 1996; Plaintiffs' Designation of Exhibits filed Nov. 21, 1996, n.4; Compliance with Court's Order from the Bench of April 24, 1997 to Point out Evidence Already in the Record Pertinent to Dispositive Motions Filed by Plaintiff ("Exhibit B to Plaintiff's Motion to Enforce, filed November 21, 1996, shows Leslie Sexton, Geraldine High School Student Council President, leading the prayer over the public-address system at an October 1996 football game and also shows a September 1994 pre-game prayer at Valley Head High School").)[26]

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[26]Exhibit B to the Plaintiffs' Motion to Enforce further depicts a pre-game prayer that Michael Chandler has testified occurred on October 19, 1996, after this lawsuit was filed. (*See* and *compare* Aff. of Michael Chandler, ¶¶ 6, 9; Ex. B to Plaintiffs' Motion to Enforce, Nov. 21, 1996; Plaintiffs' Designation of Exhibits filed Nov. 21, 1996, n.4; Compliance with Court's Order from the Bench of April 24, 1997 to Point out Evidence Already in the Record Pertinent to Dispositive Motions Filed by Plaintiff ("Exhibit B

The court finds that the evidence is uncontroverted that "over the past year,[27] students have lead [sic] the crowds in prayer at certain high school football games in DeKalb County over the public-address system." (Amended Answer of DeKalb county, ¶ 18.) Specifically, Mr. Chandler testified in his February 1, 1996 affidavit that prayer occurred from 1985 through 1995 at his "home" school of Valley Head, as well as at Geraldine, Fyffe, and Plainview games. In Stipulations 53 and 55, DeKalb County admits that such prayers over the public-address system have been had. In addition to the admission in DeKalb County's Amended Answer, the court relies upon Stipulation Numbers 51 and 53, in which it is admitted that the DeKalb County Board of Education, and also school principals, have immediate supervision and control over "home" athletic events and the public-address system and admitted that prayers and devotionals "by students and clergy" were offered in 1994 and 1995 over the public-address system.[28]

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to Plaintiff's Motion to Enforce, filed November 21, 1996, shows Leslie Sexton, Geraldine High School Student Council President, leading the prayer over the public-address system at an October 1996 football game and also shows a September 1994 pre-game prayer at Valley Head High School").

[27]Meaning the year preceding filing of the lawsuit.

[28]The court concludes that *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (1989), *cert. denied*, 490 U.S. 1090 (1989), is totally dispositive of the prayers delivered over the public-address system, regardless of whether student- or clergy-led. "When religious invocation is given via a sound

The court notes that the DeKalb County Defendants, in their Amended Answer, "admit the first sentence of paragraph 22." The first sentence of paragraph 22 of the Complaint alleges that "[t]he graduation services held in each of DeKalb County's eight high schools regularly incorporate religious invocations and/or benedictions." The DeKalb County Board of Education has not denied the allegations of paragraph 22 of the Plaintiffs' Complaint, with reference to invocations and benedictions generally and to clergy-led prayer at Crossville High School. The court finds that in May 1995, a prayer at the graduation ceremony of Crossville High School was led by the Reverend Bob Coleman. (Exhibit 1 to February l, 1996 Affidavit of Michael Chandler; Complaint, ¶ 22; Amended Answer, ¶ 22.) The court finds that an invocation was given by student Heather Elaine Clowdus at Plainview High School May 26, 1995 and

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system controlled by school principals and the religious invocation occurs at a school-sponsored event at a school or facility, the conclusion is inescapable that the religious invocation conveys a message that the school endorses the religious invocation." *Jager*, 862 F.2d at 831-32. *See also Nartowicz v. Clayton County Sch. Dist.*, 736 F.2d 646 (llth Cir. 1984) (finding no meaningful distinction between school officials themselves committing the Establishment Clause violations and permitting students to do so). Pursuant to *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this is a message that the school may not convey. *See also Jager*, 862 F.2d at 832 (stating that persons of any age may find that state endorses religion and specifically religion believing in prayer thereby denigrating the beliefs of others in violation of Establishment Clause where the school's facilities are used for prayer.

that an invocation and a benediction were given by students Chad Willis and Zack Smith at Collinsville High School's May 1995 commencement. (Exhibit 3 to February l, 1996 Affidavit of Michael Chandler.) An invocation was also given at the May 1995 Fyffe High School commencement by a student. (Exhibit 5 to February l, 1996 Affidavit of Michael Chandler.) Exhibit B to the Plaintiffs' Motion to Enforce depicts various graduation prayers, as earlier stated. The DeKalb County Defendants contend in this lawsuit that student-led graduation prayers are "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." (Plaintiffs' First Discovery Request to Defendants, Interrogatory 9; DeKalb Defendants' Answers to Plaintiffs' First Set of Interrogatories, Response to Interrogatory 12.) The court finds this to be expressly true of the May 1995 Valley Head student invocation addressed by Stipulation 63 and Plaintiffs' Interrogatory 12 and that DeKalb's response extends to "such prayers" elsewhere.

The language is that of Alabama Code § 16-1-20.3, and DeKalb has contended throughout this lawsuit, at summary judgment and elsewhere that it has permitted such conduct under the auspices of the statute. There is no evidence to the contrary in the record. The court finds that the Plaintiffs and DeKalb County have stipulated to the fact that "[g]raduation/commencement exercises are school-sponsored events for which school principals and other school officials make the ultimate decisions as to the format of the ceremony." (Stipulation Number 58. *See also* Amended Answer of DeKalb

County, ¶ 21.) The court finds that the Defendants admit that the May 1995 Crossville High School graduation featured a clergy-led invocation. (Amended Answer, ¶ 22. *See also* Exhibit 1 to February l, 1996 Affidavit of Michael Chandler.)

Exhibit B to the Plaintiffs' Motion to Enforce depicts various graduation prayers, as earlier stated. There is no evidence to the contrary in the record. The court further finds that the Defendants admit that the May 1995 Crossville High School graduation featured a clergy-led invocation.[29] (Amended Answer, ¶ 22. *See also* Exhibit 1 to February 1, 1996 Affidavit of Michael Chandler.) The court further finds that even if clergy-led prayer occurred but one time,[30] the DeKalb County Board of Education would have no defense to this constitutional violation.[31]

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[29]The clergy-led prayer is proscribed by *Lee v. Weisman*, 505 U.S. 577 (1992), even if nonsectarian.

[30]The court notes that it occurred in May 1995, after *Lee v. Weisman* was decided and after *Jones II* was decided in the Fifth Circuit. Even *Jones II* does not countenance clergy-led prayer.

[31]The United States Supreme Court and the Eleventh Circuit have held unavailing the argument of school boards that unconstitutional practices may be justified as "relatively minor encroachments on the First Amendment. The breach of neutrality [toward religion] that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'" *Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963); *Jager*, 862 F.2d at 832.

The court concludes that student-led prayer at graduation is unconstitutional as the court understands Eleventh Circuit law and Supreme Court precedents. The court has already declared Alabama Code § 16-1-20.3 unconstitutional. This federal district court does not judge it to be its province to adopt for Alabama a rule applicable to graduation prayer in another appellate circuit which does not include Alabama, especially where the court finds that rule to be in direct conflict with *Lee v. Weisman* and inconsistent with *Jager* in our own Circuit. As the court stated in footnote 4 of its March 1997 opinion, "the Court believes that the decision in *Jones II*[32] is a departure from established Supreme Court precedent" and is "inconsistent with controlling Eleventh Circuit precedent." The court further noted in footnote 4 that *Jones II* rested on questionable legal conclusions, did not sweep as far as Alabama Code § 16-1-20.3, was "aberrational" among the existing Supreme Court and federal appellate cases, and was of limited relevance to the case before it.

The court concludes that *Lee v. Weisman* proscribes even indirect coercion by state officials to pray.[33] The court concludes that, whether pursuant to a statute mandating school officials to permit "non-sectarian, non-proselytizing student-

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[32]The court refers to *Jones v. Clear Creek Ind. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993).

[33]*Lee*, 505 U.S. at 599; *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962); *Abington Twp., Pa. v. Schempp* , 374 U.S. 203, 224-25 (1963).

initiated voluntary prayer, invocation and/or benedictions"[34] or not, *Lee v. Weisman* teaches that the state, even when not officially delivering the prayer, may be effectively coercing students who do not wish to hear or participate in prayer to do so by sponsoring prayer at graduation. Under *Lee*, the fact that attendance at graduation ceremonies is not required to obtain a diploma is irrelevant.[35]

In the Eleventh Circuit, pursuant to *Jager*, "when religious invocation is given via a sound system controlled by school principals and the religious invocation occurs at a school-sponsored event at a school or facility, the conclusion is inescapable that the religious invocation conveys a message that the school endorses the religious invocation."[36]

The court finds and concludes that commencement is "a school-sponsored event at a school or facility" as stipulated by the parties. Within the meaning of *Jager* in this context, such a "religious invocation conveys a message that the school endorses the religious invocation." The court finds that the United States Supreme Court made sufficiently plain in *Lee* that

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[34]*See* Plaintiffs' Interrogatory 12 and DeKalb County's Response, "Yes."

[35]*See also Schempp*, 374 U.S. at 226; *Engel*, 370 U.S. at 430.

[36]*Jager*, 862 F.2d at 831-32. *See also Nartowicz v. Clayton County Sch. Dist.*, 736 F.2d 646 (11th Cir. 1984) (finding no meaningful distinction between school officials themselves committing the Establishment Clause violations and permitting students to do so).

even nonsectarian prayer is proscribed.[37]The court further finds and concludes that nothing in these cases interferes with, for example, a valedictorian's expressive right to make a brief reference to Deity in a valediction.[38] The court concludes that these cases touch in no way upon purely private, voluntary religious expression and that the proscription on school-sponsored prayer has no connection to prayer at baccalaureate services or similar events.

The court has, as noted earlier, examined all documents filed with the Affidavit of Michael Chandler of February 1, 1996, several of which consist of official, school-generated programs for DeKalb County commencement exercises as to which authenticity was admitted by the DeKalb Defendants in the course of discovery. (Defendants' Response to Plaintiffs' Request for Admissions, numbers 1-12, filed in various pleadings including Compliance with Court's Order from the

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[37]*Lee*, 505 U.S. at 588-89. Sectarian prayer is obviously proscribed by the Establishment Clause, as cases such as *Larsen v. Valente* make clear. Here, the court encounters the anomalous situation of a school board claiming that student-led prayers, some of which are explicitly Christian as depicted on videotape and according to uncontroverted testimony, are nonsectarian – because the school board has claimed the statute authorizes the activity. Obviously, graduation services, as the Parties have agreed, are not private time; they are school-sponsored events. To that extent, audiences may not be led in sectarian prayers, either.

[38]*See In re Gault*, 387 U.S. 1, 13 (1967) ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.").

Bench of April 24, 1997 to Point Out Evidence Already in the Record Pertinent to Dispositive Motions Filed by Plaintiff.) Exhibit 3 to this Affidavit demonstrates that the baccalaureate service of May 21, 1995 was printed on the same program as the commencement exercise at Plainview High School and that Plainview principal Bob Gray introduced the baccalaureate service. Exhibits 5 and 6 to this Affidavit indicate that the Fyffe High School and Collinsville High School's 1995 commencements were printed on the same program as the baccalaureate services and that at Fyffe High School, principal Nelson Ellis introduced the baccalaureate service. The same is true of various 1996 programs authenticated by the DeKalb County Defendants as to programs doing double duty and showing involvement of school officials. (*See*, *e.g.*, 1995 program for Plainview High School showing that principal Billy Ray Morris participated in 1995 baccalaureate program, authenticated in response to Plaintiffs' Request Number 15; Plainview High School "Thirty-Seventh Commencement Exercises" (1995), showing that principal Gray participated in baccalaureate, authenticated in response to Plaintiffs' request Number 20.)

By this observation, the court does not mean to imply that school officials may not *attend* baccalaureate functions, only that they should not, i.e., introduce ministers or lend the aura of school sponsorship to the private religious enterprise. They may not, likewise, as evidenced in Exhibit 2 to the February 1, 1996 Affidavit of Michael Chandler, excuse students from class for

baccalaureate practice.[39]

Michael Chandler's November 10, 1996 Declaration stated that all students are required to attend homeroom periods and, that DeKalb County schools are closed-campus schools, so that students may not leave the campus during the school day without permission. Nowhere in the record is this testimony controverted in such a way as to rob it of legal relevance.

The court finds that instructional time is not, as urged by DeKalb County, all time not devoted to academic instruction. For purposes of the Establishment Clause, the court does not look to the curricular or teaching-hour requirements that an accreditation agency might look to; rather, it looks to whether children are required to be present during a particular time. The concern is with the captive-audience problem, not with pedagogical matters. Thus, when Fyffe School fifth-grade teacher Brenda Powell testified in her affidavit that the Gideon Bible distribution of which she spoke "did not take away from the instructional time," the court cannot ascribe legal relevance to that testimony. The court notes that her additional testimony that "[c]ustomarily, a Gideon representative would come in to

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[39]Under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), state actions that fail any one of the three prongs of that test are unconstitutional. The commingling of the private religious commemoration, which is understood to be that, with school graduations is impermissible. School sponsorship, including excusing students from class for baccalaureate practice, is impermissible. The primary effect of such actions is to endorse religion and to convey the message that school officials favor religion.

the classroom during the homeroom period, before classes began and during non-instructional time" amplifies the misunderstanding of the DeKalb Defendants as to the meaning and importance of "instructional time" for Establishment Clause purposes. (*See* Affidavit of Brenda Powell, executed October 30, 1996.)

The court finds that the question of what is "instructional time" for Establishment Clause purposes is a legal question for the court, and it resolves this question with reference to the facts and holding of *Schempp*, 374 U.S. 203 (1963), which it believes dictates that time not being used for actual pedagogical instruction is nonetheless not free time for students and is instead compulsory time in a setting in which attendance in "homeroom period" is required.[40]

The court notes that Ms. Powell teaches at Fyffe School and that her own testimony established that Gideons "customarily" came into her classroom "during the homeroom period." The court having concluded that this is "instructional time" for the purpose of evaluating what is proscribed by the Establishment Clause, does not linger long over the conclusory testimony of Fyffe School principal James Danny Ashley about what is instructional versus noninstructional time. Michael Chandler testified in his February l, 1996 Affidavit, "From what

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[40]In *Schempp*, Bible readings opened the school day; the practice was struck as unconstitutional. *See also Berger*, 982 F.2d 1160, 1171 n.6 (7th Cir. 1993), *cert. denied*, 508 U.S. 911 (1993).

I have observed over the years, the Gideons distribute Bibles to the fifth-grade students and to the twelfth-grade students." Michael Chandler testified that Gideon representatives entered and addressed Jesse Chandler's class, and Ms. Powell's affidavit confirmed that the Gideons were allowed to make a presentation. Mr. Chandler and Mr. Ashley agree that Mr. Ashley escorted the Gideon representatives to the class.

Principal Ashley, like Mr. Chandler, testified in his affidavit executed October 30, 1996 that Gideon representatives distribute Bibles in the classrooms of the fifth and twelfth grades. Mr. Chandler testified in his February l, 1996 affidavit that he refused to permit Gideon Bible distributions at Valley Head in November 1994 but that they occurred elsewhere. Mr. Ashley testified that the Gideons "have always" passed out Bibles during homeroom but contrarily testified to an occasion "recently" when "the Gideon representatives were late in getting the Bibles to the l2th grade classes and I took them to a 5th grade class." Elsewhere in his affidavit, Mr. Ashley again reiterated that Gideon Bibles have been distributed in the classroom. The affidavit of Bill Ayers executed October 30, 1996 establishes that for the 16 years he has been a fifth-grade teacher at Plainview School, the Gideons have been distributing Bibles "the entire time I have been there." The DeKalb County Defendants' response to Plaintiffs' Request f or Admission Number 15 admits that the Gideons passed out Bibles in Ms. Whiteside's classroom during the homeroom period at Plainview School.

Mr. Ayers testified that "[t]hrough the years, the method of distributing the Bibles may have changed" and like Ms. Powell and Mr. Ashley, offered his legal conclusion as to what is instructional time. He testified that such distributions have been made during homeroom period and that students "have considered [a Gideon Bible], like many other things they obtain through school, a souvenir, and all students generally wanted the Bibles." He also testified that "for the last school year" at Plainview, the Bibles were left in the lunchroom or the principal's office for students to retrieve them as they wished but that classroom distributions "for the last school year" did not occur.

Mr. Ashley testified in his affidavit that the "policy at Fyffe School is to allow community persons and organizations to distribute information in the school." He testified that he permitted announcements and distributions of materials. He testified that "this past year, the Bibles were distributed by Gideon representatives standing on the public sidewalk and not on school property." The various affidavits of Mr. Ayers, Mr. Ashley, and Ms. Powell indicate that policies vary widely from school to school, and that the school officials at Plainview after the lawsuit was filed differ from the policies implemented at Fyffe.

The affidavit of Superintendent Parrish again offered a legal conclusion about instructional time that the court has rejected. However, the affidavit makes plain to the court that there is a reason for the divergent treatment of the Gideon

distributions: "There is no formal, written policy concerning this, but the general policy is that with the individual school principal's permission, said information is permitted at various times at the schools."

Therein lies the crux of the problem, as the court informed DeKalb County counsel at the pretrial conference in April. Still no policy of uniform applicability was adopted. Jesse Chandler therefore remains subject to the Gideons entering the classroom when he is in twelfth grade, because there is no policy proscribing it.

The court recognizes that sidewalks and streets in front of public schools have been held to be public fora.[41] The classroom is not traditionally a public forum.[42] The court notes that in *Berger*, the defendants relied upon *Widmar v. Vincent*, 454 U.S. 263 (1983) and *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), for the proposition that where a school opens its doors to one group, it cannot discriminate against any group. However, the *Berger* court correctly focused on the fact that those cases are distinguishable on the basis of the Equal Access Act.[43] The *Berger* court noted that in those cases the religious organization claiming discrimination sought access to empty school

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[41]*See Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92 (1972).

[42]*See Lamb's Chapel v. Center Moriches Union Sch. Dist.*, 508 U.S. at 392.

[43]The Equal Access Act applies only to secondary schools. 20 U.S.C. § 4071(a).

classrooms only, after the school day was over. In *Berger*, the Gideons' access was to the students, an audience. As the *Berger* court observed, "A designated public forum is a place. Children, of course, are not."[44] "The Seventh Circuit found that students are essentially a captive audience under the control of their teachers.[45]

The court is not persuaded that a limited public forum has been created in regard to classroom distributions or that it could be with regard to classroom distributions. The court agrees with the *Berger* court that children are not a place and hence finds the classroom distributions here violative of the Establishment Clause. As the *Berger* court stated, "a public school cannot sanitize an endorsement of religion forbidden under the Establishment Clause by also sponsoring non-religious speech."[46] The court finds that the same is true of classroom distributions here.

The court does not wish by the terms of its injunction to discriminate against the Gideons International. The court does not intend by its injunction to single out the Gideons for discriminatory treatment or to infringe upon their free-speech rights. By the same token, the court is disturbed by the absence of uniform regulation by school officials and the "gap" this

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[44]*Berger*, 982 F.2d at 1167.

[45]*Id.* at 1168.

[46] *Id.*

leaves in the delicate area of the interplay between the rights of nonschool persons and students. It is for this reason that the court's injunction makes reference to the location of students. The court takes it as a simple truism that, where the public schools are concerned, adult nonschool persons cannot harass or act aggressively toward students in regard to distributing *any* materials, religious or otherwise. Such conduct would not be reasonable in time, place and *manner*.

The court assumes that distributions by any and all nonschool persons can and shall be governed by a uniform policy of general applicability in all DeKalb County public schools. By ordering this in its injunction, the court does not mean to encumber ordinary discretion on the part of school principals. However, given the divergent practices to which school officials have testified, the court finds that a single, uniform policy adopted by the DeKalb County Board of Education must establish parameters for school principals so that the Establishment Clause is not violated.

The court will, upon adoption of such a policy by the DeKalb County Board and its approval by the court, modify its injunction to reflect the terms of the policy and to evidence the fact that the court has approved the policy. As reflected in its injunction, the court is disposed to view this policy-making task as the responsibility of the DeKalb County School Board and does not plan to sit as a scrivener over that process or to foist a policy of its own making upon the school board. A reasonable, constitutional policy will be approved and at that time the

injunction can be modified to embody only the reasonable time restrictions of the policy.[47]

Michael Chandler testified in his affidavit that prayer in Ms. Carroll's classroom and Ms. Carroll's selection of students to lead prayers occurred over the course of several years, including in 1995. Mr. Chandler testified that Ms. Carroll was one of Jesse Chandler's teachers in both fifth and sixth grades and that her classroom practices regarding prayer and religious activity were substantially similar in the 1993-94 and 1994-95 school years.[48] He testified that in 1995, Ms. Carroll read from her Bible to the class and selected devotionals for students to read.

The Defendants put forward no testimony from Ms. Carroll. In paragraph 16 of their Amended Answer, the DeKalb County Defendants admit that Ms. Carroll allowed student volunteers to pray in front of the class. In stipulation 46, the DeKalb County Defendants "admit that Ms. Carroll asked for volunteers to lead prayers. Defendants also admit that Ms. Carroll read aloud from the Bible, and "may have selected

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[47]The court ordered "immediate" distribution of its injunction to the Gideons for two reasons: it is early in the school year yet, and the board has been ordered to promulgate a policy in a short period of time. The court contemplated that the DeKalb County School Board might feel the need to confer with Gideon representatives about policies in place in other school systems that might satisfy constitutional criteria.

[48]At the time the Complaint was filed, Jesse Chandler was a seventh grader at Fyffe School. Complaint, ¶ 2.

devotionals for students to read." The Plaintiffs asked the DeKalb Defendants in discovery, "In paragraph 46 of the DeKalb Defendants' Response to Plaintiffs' Statement of Stipulated Facts, the defendants state, "Defendants admit that Ms. Carroll asked for volunteers to lead prayers." Do the DeKalb defendants contend in this lawsuit that such prayers offered by student 'volunteers' are 'non-sectarian, student-initiated voluntary prayer, non-proselytizing, invocations, and/or benedictions'?" The Defendants responded, "Yes."

The court concludes, as it concluded in its March 1997 Opinion and Order, with reference to the statute, that such practices are unconstitutional regardless of whether the practices are ostensibly "voluntary" or "student-initiated" and may regardless of whether prayers are nonsectarian or students may be excused from the classroom.[49] The court finds that such classroom practices need not involve direct coercion in the form of a legal penalty or sanction in order to offend the Establishment Clause.[50]The court further finds that it should be clear that activities such as those admitted by DeKalb County

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[49]*Engel v. Vitale*, 370 U.S. 421, 423-24 (1962); *Schempp*, 374 U.S. at 224-25; *Lee*, 505 U.S. at 599; *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 279 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 388 (1996); *ACLU v. Black Horse Pike Regional Bd. Of Educ.*, 84 F.3d 1471, 1479-80 (3d Cir. 1996); *Herdahl v. Pontotoc County Sch. Dist.*, 887 F. Supp. 902, 908 (N.D. Miss. 1995); *Gearon v. Loudon County Sch. Bd.*., 884 F. Supp. 1097 (E.D. Va. 1993).

[50]*Lee*, 505 U.S. at 592-95.

have been squarely governed by *Engel* and *Schempp* for some 35 years.

That said, the court further concludes that the teaching of *Schempp* is also that the Bible may be studied for its literary qualities and that "such study of the Bible, when and historic presented objectively as part of a secular program of education" is constitutional. This is distinct from reading devotionals from the Bible absent academic content.

The Plaintiffs allege that prayers and devotionals have taken place at school-sponsored assemblies and events and over the school intercom. The court has already addressed scriptural readings and use of religious texts where part of a course of study in its March 1997 opinion and order. The DeKalb Defendants specifically admit that student-led devotionals have taken place at Plainview School. (Stipulation 50.) They contend that these devotionals are "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." (DeKalb Defendants' Answers to Plaintiff's First Set of Interrogatories, Number 11.) The DeKalb Defendants more specifically contend that such a "devotion"[51] offered at D.A.R.E. ceremonies and events are "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." (DeKalb Defendants' Answers to Plaintiff's First Set of Interrogatories, Number 5. *See also* Stipulation 30.)

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[51]DeKalb Defendants' [Supplemental] Responses to Plaintiffs' First Discovery Requests, Number 5.

This is the language of Alabama Code § 16-1-20.3 which this court has previously found to be unconstitutional.

The Plaintiffs further allege that Jesse Chandler attended a D.A.R.E. "graduation" ceremony at Fyffe School on May 18, 1994 at which a student gave a Bible reading and a devotional. The Plaintiffs also allege that in December 1995, the D.A.R.E. ceremony also included prayers and a devotional message as well as teacher-led religious singing. (The Plaintiffs evidently refer to two separate D.A.R.E. events, and the Defendants only to one in the Complaint and Amended Answer.) The court notes that paragraph 26 of the Complaint alleges that the Reverend Graham of Nazareth Baptist Church was invited to speak at the Valley Head D.A.R.E. program in 1994. The Plaintiffs allege that the Reverend Graham quoted from the Bible during his speech. The Defendants admit that the Reverend Graham made references to scripture. (Amended Complaint, ¶ 26.)

All fifth-graders in DeKalb County schools do participate in the D.A.R.E. program. (*See* Stipulation 28.) In Stipulation 30, DeKalb County states, "DeKalb defendants admit that two students volunteered to give words of inspiration at the D.A.R.E. graduation program at Fyffe School on May 18, 1994." The Defendants' response to Plaintiffs' Stipulation 30 that the D.A.R.E. 1995 graduation ceremony included student-led prayers and devotionals as well as the singing of a religious song by a teacher was not specifically denied as to prayers and devotions, and it was admitted that a teacher sang a song.

DeKalb also authenticated a program for its May 18,

1994 Culmination Program at Fyffe School which indicates that D.A.R.E. is at least in part sponsored by the DeKalb County Schools. The record indicates that the discovery response authenticating the document was served on Plaintiffs' counsel October 10, 1996. DeKalb also stipulated in September 1996, that the D.A.R.E. program is "operated and managed by the DeKalb County Board of Education and daily administered and managed by Donna Taheri, an employee of the DeKalb County Board of Education. (Stipulation Number 27.)

On October 30, 1996, with Plaintiffs' dispositive motions pending, the DeKalb Defendants tendered the affidavit of Donna Taheri again invoking the phrase "words of inspiration" and apparently disavowing any state action inasmuch as she testified that D.A.R.E. is a program of law enforcement, not a school-run program. While she testified to her opinion that student devotionals are merely inspirational, not religious, and to her recollection that "there has never been a religious activity at any description at a D.A.R.E. graduation ceremony," her own testimony elsewhere in her affidavit is that some students at D.A.R.E. graduation ceremonies gave Bible readings.

Similarly, in Interrogatory Number 11, the Plaintiffs ask: "In paragraph 50 of the DeKalb Defendants' Response to Plaintiffs' Statement of Stipulated Facts, the defendants state, 'Defendants admit that student-led devotionals have taken place at Plainview School.' Do the DeKalb defendants contend in this lawsuit that such prayers offered by student 'volunteers' are 'nonsectarian, non-proselytizing, student-initiated voluntary

prayer, invocations, and/or benedictions'?" DeKalb responded, "Yes."

Since all of the Parties, as well as the Court, appear to be of the opinion that a "devotional" is a religious exercise, that falls within the category of "prayer, invocations and/or benedictions," and the Court finds that for the same reasons it has found that under established United States Supreme Court precedent that vocal prayers led by students in the classrooms are unconstitutional, student-led "devotionals" are similarly unconstitutional.[52] This applies to devotionals at Plainview as well as to devotionals at school-sponsored events, such as D.A.R.E. events.

The court's findings about the religious nature of devotionals, and the conclusion that D.A.R.E. is a school-sponsored activity, compel the conclusion that use of state facilities, including the intercom, for these religious messages is a violation of the Establishment Clause. The court is not persuaded that anything in the Defendants' affidavits, moreover, establishes any *de minimis* exception to the establishment clause. *Schempp's* admonition that no breach is trivial controls the court's analysis.

The court finds that based on the Defendants' affidavits, devotionals and prayers occurred at Plainview School. The court specifically finds that DeLayne Etherton's affidavit establishes

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[52]*See Engel*, 370 U.S. at 423-24; *Schempp*, 374 U.S. at 224-25; *Lee*, 505 U.S. at 599.

that on Veterans Day 1995, a prayer occurred at the conclusion of a student message. The court also finds that prayer is not mere ceremonial Deism of the sort contemplated by the "in God We Trust" motto on our currency. Accordingly, the court cannot find that prayer should occur on ceremonial occasions such as Veterans Day or any other of the numerous holidays celebrated in the public schools. Nor does the court find any justification for prayer over the intercom as a gesture of patriotism. Indeed, numerous Supreme Court cases counsel against tying religion to patriotism and obviously, against identification with the state. The court concludes that there is neither a *de minimis* nor a "national crisis" exception to the establishment clause. *See generally, Lynch v. Donnelly*, 465 U.S. 668 (1984).

ORDER

Based on the foregoing, it is hereby CONSIDERED and ORDERED that:

Plaintiffs' November 6, 1997 Motion to Enjoin Proceedings in the Etowah County Circuit Court, be and the same is hereby DENIED AS MOOT.

Plaintiffs' November 10, 1997 Motion To Alter Or Amend The Court's October 29, 1997 Permanent Injunction be and the same is hereby GRANTED. The "Findings Of Fact And Conclusions Of Law," upon which the court based its October 29, 1997 Permanent Injunction, are articulated herein.

In addition and in the alternative to GRANTING Plaintiffs' November 10, 1997 Motion To Alter Or Amend:

Pursuant to Federal Rule of Civil Procedure 60(a), this Supplemental Opinion and Order, and the "Findings Of Fact And Conclusions Of Law" articulated herein shall be and the same are hereby considered issued concomitantly with the court's October 29, 1997 Permanent Injunction *nunc pro tunc*. The court's Memorandum Opinion and Order, issued concomitantly, on this date, with this Supplemental Opinion and Order, shall be and the same is hereby INCORPORATED BY REFERENCE into this Supplemental Opinion and Order.[53]

The court's October 29, 1997 Permanent Injunction shall remain in full force and effect pending an Order from the Eleventh Circuit Court of Appeals or the issuance of a

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[53]In its Memorandum Opinion and Order, the court grants Plaintiffs' September 27, 1996 Motion For Partial Summary Judgment. The court finds the granting of this motion, and the findings of fact and conclusions of law articulated therein, to be an integral, although not dispositive, portion and basis of its Findings Of Fact And Conclusions Of Law articulated in this Supplemental Opinion and Order, supporting its October 29, 1997 Permanent Injunction. Many of the findings of fact in each document are repetitive, however the court's Memorandum Opinion and Order more clearly articulates those facts that are uncontroverted or which are clearly established for purposes of resolution of dispositive motions. The two documents issued on this date are meant to be read concurrently, although each is fully supportable on its own. When the two documents issued on this date are read concurrently with the court's March 1997 Memorandum Opinion and Order and the October 29, 1997 Permanent Injunction, one can easily discern the full factual and legal basis for the court's injunction.

subsequent Order from this court upon due consideration of the Defendant Attorney General's "Motion For Partial Stay Of Permanent Injunction" filed November 10, 1997.[54]

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[54]The court notes that its October 29, 1997 Permanent Injunction merely **PROHIBITS THE STATE FROM COERCING RELIGIOUS PRACTICES OR PROMOTING ONE TYPE OF RELIGIOUS ACTIVITY OR VIEWPOINT OVER ANOTHER**. Indeed, the court's Permanent Injunction and March 1997 Opinion and Order goes to great lengths to articulate the activities permitted in public schools under the First Amendment to the United States Constitution as interpreted by the United States Supreme Court and the Eleventh Circuit Court of Appeals. Indeed, the DeKalb County school board, amongst others, noted the clear and distinct guidelines regarding permissible religious activity in public schools that the court's Orders provided educators and the public. As the court's previous Order's disclose, the First Amendment clearly protects personal religious activity and beliefs. At the same time, it clearly prohibits state initiation or promotion of religious activity or beliefs. School officials are arms of the state, and must abide by the requirements of the First Amendment.

The First Amendment requires that states "pursue a course of neutrality toward religion" *Jager v. Douglas County School District*, 862 F.2d 824, 828 (11 Cir. 1989)(citing *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985)). State initiated or sponsored actions that utilize one type of religious activity over another necessarily "promote" that type of activity over others. As the court's March 1997 Opinion and Order notes: "It was devout religious conviction which led many colonists to leave England and settle in America. Unwilling to suffer the state-sponsored Church of England, many settlers came to this country in search of the right to freely exercise their religious beliefs -- to be free from state-established religion." (March Op. and Order at 3 (citing *Engel v. Vitale*, 370 U.S. 421, 434

(1962).)

The right to be free from state-established religion lies at the heart of the concept freedom embodied in the First Amendment to the United States Constitution. *Lee v. Weisman*, 505 U.S. 577, 591 (1992). When the state forces school-children to pray, or coerces participation in religious activity, it infringes on school-children's freedom of religion in violation of their rights under the First Amendment. *See Jaffree*, 472 U.S. at 49 (noting that the Fourteenth Amendment "imposed the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power"). For example, the state may not force Christian, Jewish, Buddhist, Baptist, atheist or agnostic schoolchildren to participate in Muslim religious activities just as the state may not force Muslim, Jewish, Buddhist, Baptist, atheist, or agnostic schoolchildren to participate in Christian religious activities (the court utilizes these viewpoints for exemplary purposes only -- under the First Amendment, each individual is entitled to their own beliefs free from state intrusion).

Regardless of whether state officials state officials and school boards believe that a particular religious viewpoint is the "correct" viewpoint, the concept of "freedom of religion," embodied in the First Amendment, means that each person is entitled to choose their own religious beliefs and practices WITHOUT INTERFERENCE OR INFLUENCE FROM THE STATE. *See Jaffree*, 472 U.S. at 52 ("the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority"). Freedom of religion necessarily includes freedom *from* religion. *Id.* at 53. ("the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all"). Contrary to the misstatements, hyperbole, and speculation surrounding the court's injunction and March 1997 Opinion and Order, **the court's Permanent Injunction DOES NOT restrict schoolchildren's First Amendment rights** – *it actually protects those rights from unwarranted and*

unconstitutional interference from the state.

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MICHAEL CHANDLER, et al.,

Plaintiffs,

v. **CV 96-D-169-N**

FOB JAMES, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER[1]

The court finds it necessary to vacate the portions of its October 31, 1997 Order denying as moot Plaintiffs' September 27, 1996 Motion For Partial Summary Judgment. All other aspects of the court's October 31, 1997 Order shall remain in full force and effect. For the following reasons, the court finds that Plaintiffs' September 27, 1996 Motion For Partial Summary Judgment is due to be granted. The court previously granted

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[1] The court retains jurisdiction over this action during the pendency of Plaintiffs' Rule 59 Motion. *See Fed. R. App. P.* 4(a)(4); *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 59 (1982); *see also* Court's Supplemental Opinion and Order, notes 3-7 and accompanying text, issued concomitantly with this Memorandum Opinion and Order.

leave for Plaintiffs to file their Motion For Partial Summary Judgment out of time.

The Plaintiffs have brought several closely related claims in this lawsuit. First, in Count One, they challenged Alabama Code section 16-1-20.3 as violative of the First Amendment on its face. The Plaintiffs sued Alabama's Attorney General, in his official capacity, as he is charged with the enforcement of Alabama statutes. The Plaintiffs also sued the State Board of Education and all of its members, including the State Superintendent of Education and the Governor, and the President of the State Board of Education, all in their official capacities. These parties, charged with implementing Alabama's laws regarding education, promulgated an administrative regulation, based on Alabama Code Section 16-1-20.3. The DeKalb County Board of Education carried out the statute and the regulation in the DeKalb County schools, where Michael Chandler works and where Jesse Chandler attends. This court has already addressed the facial statutory claim in its March 12, 1997 Opinion and Order ("March 1997 Opinion and Order"). There, the court found that § 16-1-20.3 violated both the Free Exercise Clause and the Establishment Clause of the First Amendment. The facial claim has been resolved as against these Defendants by the court's March 1997 Opinion and Order.

Based, in part, upon the court's findings in its March 1997 Opinion and Order, the court now finds that Plaintiffs are entitled to judgment as a matter of law on all of their claims discussed below. The court has made extensive factual findings

in its Supplemental Opinion and Order issued concomitantly with this order, discussing injunctive relief, and it has delineated there general facts related to injunctive relief as well as summary judgment facts. The court does not recapitulate in toto those factual findings here, but rather, summarizes the facts at summary judgment and focuses on the law, including the burden the DeKalb County Board of Education bears at summary judgment.[2]

SUMMARY JUDGMENT STANDARD

On a motion for summary judgment, the court is to construe the evidence and factual inferences arising therefrom in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Summary judgment can be entered on a claim only if it is shown "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56*(c). As the Supreme Court has explained the summary judgment standard:

> [T]he plain language of Rule 56(c) mandates the

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[2] While the DeKalb County Board filed affidavits, it did not make reference to them in its brief nor suggest in its brief that there were "genuine issues of material fact" which remain to be resolved. Instead, the DeKalb County Board argued that if the court were to rule on the facial challenge to the statute, most of the issues in this case would be resolved. The Governor, over the Plaintiffs' protests, did oppose the motion for partial summary judgment against DeKalb County, filing a brief which dealt extensively with the filed affidavits.

> entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

The trial court's function at this juncture is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986)(citations omitted). A dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248; *see also Barfield v. Brierton*, 883 F.2d 923, 933 (llth Cir. 1989).

The party seeking summary judgment has the initial burden of informing the court of the basis for the motion and of establishing, based on relevant "portions of 'the pleadings, depositions, answers to interrogatories, and admissions in the file, together with affidavits, if any,'" that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323. Once this

initial demonstration under Rule 56(c) is made, the burden of production, not persuasion, shifts to the nonmoving party. The nonmoving party must "go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324; *see also* Fed. R. Civ. P. 56(e).

In meeting this burden the nonmoving party "must do more than simply show that there is a metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). That party must demonstrate that there is a "genuine issue for trial." *Fed. R. Civ. P.* 56(c); *Matsushita*, 475 U.S. at 587. An action is void of a material issue for trial "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita*, 475 U.S. at 587; *see also Anderson*, 477.

In other words, the moving party must show a legal basis for the court to enter judgment, but it does not have to shoulder the burden of production. Once the moving party has made such a showing, it falls to the nonmoving party to produce evidence sufficient to establish the truth of each element on which it will bear the burden of proof at trial.

In *Celotex*, for example, the defendant, relying solely on the plaintiff's discovery responses, moved for summary judgment. Without producing any evidence that tended to negate the plaintiff's claims, the defendant argued that the plaintiff could not prove her claims at trial. In upholding the trial

court's grant of judgment in favor of the defendant, the *Celotex* Court held that at summary judgment, the nonmoving party must support his or her claims. The moving party does not have to disprove them. It held that nothing in Rule 56 requires a moving party to support its motion with affidavits or with anything else that would disprove the nonmoving party's (usually the plaintiff's) claims. *See Celotex*, 477 U.S. at 323. The moving party does not even have to prove the nonexistence of a genuine issue of material fact, but rather the nonmoving party must demonstrate that genuine issues for the fact finder do exist. *Id.*; 325. U.S. at 249.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DISCUSSION[3]

It is with these principles in mind that the court views the Governor's submission on behalf of DeKalb County and the affidavits filed by DeKalb County itself. Even when taking Defendants' responses into consideration, and under the standards enunciated herein, the court still finds that Plaintiffs are entitled to summary judgment. While the affidavits deny the existence of any "religious" activities, the witnesses simultaneously acknowledge that Bible readings, prayers and "devotionals" have taken place at various DeKalb County school-sponsored settings. Under *Celotex*, this is not a showing sufficient to demonstrate the existence of a genuine issue of fact.

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[3]Because of the factual nature of this inquiry, the court combines its analysis.

Whether a "devotional" took place may be a fact for resolution by the fact finder, but whether an admitted "devotional" given over the intercom during the school day violates the First Amendment is a matter of law for the Court to decide.

The court is mindful that it must draw inferences in favor of the nonmoving party. Nevertheless, when the nonmoving party, here DeKalb, as represented by the Governor, offers testimony in an affidavit that is internally contradictory, the court does not believe that it is under an obligation to ignore facts admitted by the witness (*i.e.*, that Bible readings or prayers occurred) in favor of that witness' characterization of the same event (the Bible readings and devotionals that ended with a prayer were "not religious"). Similarly, the court does not believe that it is under an obligation to assume for purposes of summary judgment that an event did not occur, when, in response to the allegations of the Plaintiff, the Defendants' witness states that he or she does not remember whether the event took place or not. The court does not believe that this is a showing sufficient to "negate [the plaintiff's] claims" and demonstrate the existence of a material issue of fact.

I. Plaintiffs' Motion for Partial Summary Judgment

The Plaintiffs moved for summary judgment as to several religious practices ongoing in DeKalb County. Some of these overlap with the issues on which Plaintiffs also sought judgment on the pleadings. The court notes at the outset that stipulations among parties are admissible for Rule 56 purposes and require no extrinsic evidence. *Hadady Corp. v. Dean Witter Reynolds*,

739 F. Supp. 1392, 1395 n. 2 (D. Cal. 1990).[4] The same is true of undisputed documents. *See* 10A Wright, Miller & Kane, *Federal Practice & Procedure*, Sec. 2730.1 & nn. 10-11, at 84-85. The court may also consider affidavits earlier submitted in a motion for preliminary injunction. *Clinkscales v. Chevron USA Inc.*, 831 F.2d 1565 (11th Cir. 1987). Any exhibits in the court file at summary judgment may be admitted, regardless of the reason for their initial submission. *McLaughlin v. Liu*, 849 F.2d 1205, 1206 n.3 (9th Cir. 1988).

A. Prayer at Football Games

In his affidavit, filed along with the Complaint, Michael Chandler offered testimony regarding prayers at the DeKalb County high school football games in paragraphs 8-16. Therein, he specifically testified that he has personally witnessed such prayers; that he has been offended on his behalf and on behalf of his son Jesse; and that he videotaped some of these prayers, including one at Valley Head High School, where he must attend all home games,[5] that occurred September 1, 1994. His Declaration under Penalty of Perjury of November 10, 1996

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[4]The Eleventh Circuit has held, in a ruling based on stipulated facts, that if evidence is capable of different reasonable interpretations, findings based on one of these reasonable interpretations are not clearly erroneous. *GLBA v Pryor*, 110 F.3d 1543, 1546-47 (11th Cir. 1997). (*quoting L & C Marine Transport Ltd. v. Ward*, 755 F.2d 1457, 1461 (11th Cir. 1985)).

[5]*See* Amended Answer of DeKalb County Board of Education, ¶ 19. See also Plaintiffs' Designation of Exhibits filed November 21, 1996 and Affidavit Of Michael Chandler February 1, 1996.

similarly contains testimony that students have been leading prayers at high school football games.[6] None of the Defendants has offered testimony that contradicts any of evidence or that constitutes a genuine question of material fact.[7]

The practices which DeKalb has admitted in its Stipulations, ¶¶ 51, 53 and 55, are unconstitutional, regardless of any purported explanation for them. *See Abington Twp. v. Schempp*, 374 U.S. 203, 223-24 (1963); *Jager v. Douglas*

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[6]Exhibit B to the Plaintiffs' Motion to Enforce Voluntary Cessation Agreement is the videotape which according to the Chandler February 1, 1966 affidavit includes the September 1, 1994 Valley Head prayer. It also includes filmed prayer after this lawsuit was filed at Geraldine High School, but for purposes of summary judgment, the court does not consider the Geraldine prayer.

[7]It is not the court's province to judge Mr. Parrish's veracity at this stage. Assuming that he is telling the truth and that pregame student or clergy-led prayers had ceased during the 1996 school year, this is not a defense to the Plaintiffs' motion for summary judgment.

If a defendant could assure itself victory in a lawsuit simply by promising to "be good" in the future, the courts would be overrun with parties repenting of their past wrongdoing -- temporarily. It is axiomatic that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case. . . ." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *see also United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 333 (1952).

Mr. Parrish does not deny that pre-football game prayers have occurred in the past, but rather he claims that this activity has stopped after the lawsuit was filed. (Parrish Aff., ¶ 6.) Even assuming that this were true, voluntary cessation of allegedly unconstitutional conduct is not a defense.

County Sch. Dist., 862 F.2d 824, 830 (1989), *cert. denied*, 490 U.S. 1090 (1989); *Nartowicz v. Clayton County Sch. Dist.*, 736 F.2d 646 (llth cir. 1984). The court has so found in its March 1997 Opinion and Order.

B. Bible Readings and Devotionals at Assemblies

The DeKalb Defendants have admitted that students gave "words of inspiration" and a teacher sang a religious song at a D.A.R.E. graduation attended by all fifth grade students. (Defendants' Response ¶¶ 28-32).[8] They do not deny, as the Plaintiffs allege in Stipulation number 30, that these words included a reading from the Old Testament. (Stipulation 30.) Rather, they "admit that two students volunteered to give words of inspiration at the D.A.R.E. graduation program at Fyffe School on May 18, 1994." (Stipulation 30.) In supplemented discovery apparently served February 4, 1995, the DeKalb Defendants equate "words of inspiration" with a "devotion."[9] In addition, the DeKalb Defendants admit that student-led devotionals have occurred during school-sponsored events and over the public address system. (Defendants' Response ¶¶ 30, 50). Michael Chandler's February 1, 1996 affidavit similarly offers testimony of student-led devotionals. While Donna Taheri

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[8]While the D.A.R.E. program is not compulsory, all fifth graders in DeKalb County participate. *See* Stipulation 28.

[9]The supplemental discovery, response to interrogatory number 5, is appended as Exhibit C to Plaintiffs' April l, 1997 Supplement to Motion for Sanctions and Opposition to DeKalb Defendants' Request for Time.

testified to her opinion that student devotionals are merely inspirational rather than religious, and to her recollection that "there has never been a religious activity of any description at a D.A.R.E. ceremony," testimony elsewhere in her affidavit indicates that some students at D.A.R.E. graduation ceremonies gave Bible readings.

In response to Plaintiffs' Interrogatory Number 5, "Do the DeKalb defendants contend in this lawsuit that this May 18, 1994 action by these two students was 'non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions?," the DeKalb defendants responded, "Yes" in addition to equating "words of inspiration" with "devotion[s]." The court finds it reasonable to conclude that mere "words of inspiration" would not require the invocation of the Alabama school-prayer statute and that DeKalb conflated such a category of inspirational words into the category of devotions, in hopes of thereby insulating them from scrutiny. The specific invocation of the statute would not be necessary for secular "words of inspiration," and DeKalb has expressly invoked the language of the statute in discovery responses.

The same is true of conceded devotionals at Plainview School, referenced in Stipulation 50 and similarly answered "Yes" in response to the same contention interrogatory referencing that specific conduct. (In Stipulation 50, the DeKalb Defendants actually term the exercise "devotionals" and then additionally invoke the language of the statute.)

The court finds that a devotional is generally understood

to be religious and that the affidavit of Bill Ayers refers to devotionals that took place at Plainview. He also testified to student messages over the intercom during the Gulf War that were of "a devotional character, . . . but not religious," in ¶ 5 of his affidavit, while simultaneously testifying in ¶ 3 that he had no recollection of devotionals being broadcast. He testified that student messages "of a devotional character" contained "no religious references" although "there may have been an occasional brief religious reference or prayer." (Ayers Aff., ¶ 5.) The students giving the messages "did not pray and read the bible" "each" of the "three or four, maybe five times" they led the devotionals, according to Mr. Ayers.

He also testified to a devotional over the public-address system on Veterans Day 1995. DeLayne Etherton testified that this "devotion, meditation, or other inspirational message" ended with a prayer. (Etherton Aff., ¶ 8.) Like Mr. Ayers, DeLayne Etherton cannot recall "if a Bible reading or prayer was given" on other occasions "although there may have been, but not each time."

DeLayne Etherton cannot specifically recall the content of these "so-called 'devotionals'" that were "not necessarily" prayer and Bible reading. DeLayne Etherton does recall, however, that the Veterans Day message ended with a prayer but "was not of a religious nature." (Compare Etherton Aff. ¶ 8 with ¶ 6.)

At this juncture, *Celotex* comes into play. Testimony about "nonreligious" devotionals that ended with a prayer and

that were conducted with the protection of a statute that permits "student-initiated prayer, invocations and benedictions" at school events does not establish a genuine issue of material fact.

Similarly, a witness who states that he cannot remember whether or not an event alleged to have happened by the moving party actually took place does not help the nonmoving party to meet its burden. The nonmoving party must come up with evidence that negates the version of events alleged by the moving party -- an acknowledgment that the event may have occurred, but the witness cannot remember, falls short.

The court cannot reconcile these observations with the truism that prayer is a quintessentially religious act. The court further notes that, despite protestations that messages were merely inspirational or patriotic from all of DeKalb County's affiants, once again, it answered the Plaintiffs' contention interrogatory referencing student-initiated prayer in the language of the statute, "Yes."

The admissions of ¶¶ 30 and 32 of the DeKalb Defendants' response are admissions of constitutional violations. See *Engel*, 370 U.S. at 226; *Schempp*, 374 U.S. at 203. These activities are unconstitutional, even if the religious devotionals were led or given by students. *Schempp*, 374 U.S. at 207 (prayer and Bible reading); *Treen*, 653 F.2d at 902 (prayer); *Ingebretsen*, 88 F.3d at 279; *Hall*, 656 F.2d 999 (student-led devotionals); *Meltzer v. Board of Pub. Instr.*, 548 F.2d 559, 573-73 (5th Cir.), aff'd rehearing en banc, 577 F.2d 311, 312 (5th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979) (student-led

devotionals); *Herdahl v. Pontotoc Count Sch. Dist.*, 887 F. Supp. 902, 908-09 (N.D. Miss. 1995) (student-led devotionals over public-address system are not within the ambit of Equal Access Act, 20 U.S.C. 4071 et seq; Bible readings followed by short prayer speak to a captive audience through state machinery).

None of the affiants aid DeKalb County in establishing a genuine question of material fact as to prayer and devotionals -- it is admitted in the affidavits, and in stipulations that predated them -- that prayer occurred. The court concludes that there is no *de minimis* exception for Establishment Clause 374 U.S. 203, 225 (1963); *Jager*, 862 F.2d at 832 (irrelevant that pregame prayers are brief and football season is short). Nor is the court persuaded that an exception, exists for perceived crises and wartime. Indeed, the court would suspect that we might be most vigilant about the Establishment Clause at precisely such times. *See generally Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 382 (1985).

C. Prayer in Classrooms

It is uncontroverted in the pleadings and in the record that there has been prayer in classrooms, as Plaintiffs allege. The court notes that the DeKalb County Defendants have responded to Plaintiffs' interrogatories regarding faculty solicitation of student volunteers to lead classroom prayer with the response that such activity was undertaken as "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations and/or benedictions." (*See* Plaintiffs' First Discovery Request to

DeKalb Defendants; DeKalb Defendants' Answers to Plaintiffs First Set of Interrogatories, "Yes").

Further, Michael Chandler testified in his affidavit that Ms. Carroll allowed prayer in her classroom and selected students to lead prayers over the course of several years, including in 1995. Ms. Carroll was one of Jesse Chandler's teachers in both fifth and sixth grades, and her classroom practices regarding prayer and religious activity were substantially similar in the 1993-94 and 1994-1995 school years. Mr. Chandler testified that in 1995, Ms. Carroll read from her Bible to the class and selected devotionals for students to read.

As noted, the Defendants do not challenge this evidence. Indeed, they offer no testimony from Ms. Carroll. In paragraph 16 of their Amended Answer, the DeKalb County Defendants admit that Ms. Carroll allowed student volunteers to pray in front of the class. In stipulation 46, the DeKalb County Defendants "admit that Ms. Carroll asked for volunteers to lead prayers." Defendants also admit that Ms. Carroll read aloud from the Bible, and "may have selected devotionals for students to read." The Plaintiffs asked the DeKalb Defendants in discovery, "In paragraph 46 of the DeKalb Defendants' Response to Plaintiffs' Statement of Stipulated Facts, the defendants state, 'Defendants admit that Ms. Carroll asked for volunteers to lead prayers.' Do the DeKalb defendants contend in this lawsuit that such prayers offered by student 'volunteers' are 'non-sectarian, non- proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions'?" The Defendants

responded, "Yes."

The court concludes, as it concluded in its March 1997 Opinion and Order, with reference to the statute, that such practices are unconstitutional regardless of whether the practices are ostensibly "voluntary" or "student-initiated" and regardless of whether prayers are nonsectarian or students may be excused from the classroom.[10] The court finds that such classroom practices need not involve direct coercion in the form of a legal penalty or sanction in order to offend the Establishment Clause.[11] The court further finds that it should be clear that activities such as those admitted by DeKalb County have been squarely governed by *Engel* and *Schempp* for some 35 years.

That said, the court further concludes that the teaching of *Schempp* is also that the Bible may be studied for its literary and historic qualities and that "such study of the Bible, when presented objectively as part of a "secular program of education" is constitutional. This is distinct from reading devotionals from the Bible absent academic content.

D. Distribution of Bibles and Religious Literature by

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[10]*Engel v. Vitale*, 370 U.S. 421, 423-24 (1962); *Schempp*, 374 U.S. at 224-25; *Lee*, 505 U.S. at 599; *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 279 (5th Cir. 1996), cert. denied, 117 S. Ct. 388 (1996); *ACLU v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1479-80 (3d Cir. 1996); *Herdahl v. Pontotoc County Sch. Dist.*, 887 F. Supp. 902, 908 (N.D. Miss. 1995); *Gearon v. Loudon County Sch. Bd.*, 884 F. Supp. 1097 (E.D. Va. 1993).

[11]*Lee*, 505 U.S. at 592-95.

Nonstudents

The DeKalb Defendants admit in their responses to stipulations that they permit representatives of Gideons International to distribute New Testaments to public school students in the classroom. (Stipulation ¶ 35.) Gideons representatives have been allowed to enter classrooms and make presentations to the students. (Powell Aff., ¶ 5.) Jesse Chandler was in a classroom where such presentations and distributions took place and felt compelled to accept a Bible. (Chandler Aff., ¶ 21.) The court does not seek to resolve any factual issue as to the content of any presentation the Gideons might make, because it is not material in view of the fact that the Gideons are impermissibly in the classroom during instructional time.

Courts have uniformly held that school officials are prohibited from permitting outside groups and individuals to distribute Bibles and other religious literature to students on public school property. See *Berger v. Rensselaer Central Schl. Corp.*, 982 F.2d 1160 (7th Cir. 1993), *cert. denied*, 113 S. Ct. 2344 (1993); *Gregorie v. Centennial Schl. Dist.*, 907 F.2d 1366 (3d Cir. 1990); *Lubbock C.L.U. v. Lubbock Indep. Schl. Dist.*, 669 F.2d 1038, 1040, n.38 (5th Cir. 1982).[12] The reason for this proscription is that students are a captive audience in such situations and face school and peer pressure to accept the

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[12] Public school classrooms and buildings are not public fora such that outside groups have any cognizable free-speech interest in distributions. *Berger*, 982 F.2d at 1166. Here, of course, the issue is distribution inside public-school classrooms during instructional time.

Bibles. In addition, such Bible distributions interfere with the rights of parents to raise their children according to family religious traditions. See *Schempp*, 374 U.S. at 226.

Bible distribution creates the impression of school endorsement of the religious activity and, as at least one court has noted, facilitates the accomplishment of the religious mission of groups such as the Gideons. *See Berger*, 982 F.2d at 1171. Such distribution here expressly occurred with the permission of school officials, such as Mr. Ashley and Ms. Powell at Fyffe. Superintendent Parrish testified that there is no formal written policy governing distributions of materials. (Parrish Aff., ¶ 8.) Policy is established by the individual school principals, and varies widely. (See Parrish Aff., ¶ 8; Ashley Aff., ¶ 8.)

Ms. Powell and Mr. Ashley testified that a distribution that occurred after homeroom was aberrational. (Ashley Aff., ¶ 6; Powell Aff., ¶ 5.) This testimony is not material because it does not affect the legal question concerning whether homeroom time is instructional time for establishment clause purposes.[13] Thus, any attempt to explain away the unconstitutional activity as an aberration or exception is unavailing. (See, e.g., Ashley Aff., ¶ 6.) Defendants admit that they allowed Bible distribution to occur in a classroom setting, with participation of school officials; an atmosphere rife with

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[13]The court notes that the Equal Access Act applies only to secondary, not primary schools. It is not implicated as regards the Gideon distributions at issue here.

potential for both proscribed endorsement of religion and peer pressure. A practice of in-school distribution immediately before the first class period is still constitutionally infirm. (See Powell Aff., ¶ 5.) The court is not persuaded by the "homeroom period is noninstructional time" argument made by all the Defendants' affiants on the subject.

Michael Chandler testified that all students are required to attend homeroom periods and that DeKalb County schools are closed campuses and that students are not free to leave. (Chandler Dec. of November 10, 1996.) Nowhere in the record is this testimony controverted. Moreover, the court finds that the question of what is "instructional time" for purposes of the Establishment Clause in such situations is resolved by *Schempp*. *Schempp* explicitly involved Bible readings which opened the school day. They were not given during time otherwise reserved for academic instruction, but rather, during homeroom, and were struck as unconstitutional. The classroom is not traditionally a public forum. *See, e.g., Lamb's Chapel v. Center Moriches Union Sch. Dist.*, 508 U.S. at 392; *see also Berger*, 982 F.2d at 1167.

The distribution of Bibles or other religious material by nonschool persons during the school day, regardless of the exact location where that distribution took place (even outside the actual classroom), and purportedly involving only "willing" students, has been almost uniformly held unconstitutional. The critical factors for the courts are that students will feel compelled through peer pressure to accept the Bibles and will

sense state endorsement. *Berger*, 982 F.2d at 1166-1167 & n.7 (Gideon distribution at school "gives the Bible distribution an official quality."). The court finds that Defendants' practice of allowing Gideons and other outside groups to distribute Bibles and/or other religious materials to students during the homeroom period violates the Establishment Clause.

E. Miscellaneous Matters

The court notes that initially, the DeKalb Defendants did not file a response to the Plaintiffs' motion. However, the Governor responded to the motion filed against the DeKalb Defendants and concerning only events which took place in DeKalb County schools. The DeKalb Defendants then filed a separate opposition to the Plaintiffs' Motion for Partial Summary Judgment, which ignored the affidavits purportedly offered on their behalf, made no reference to evidence, and relied on section 16-1-20.3 as DeKalb's sole justification for its actions. DeKalb County urged the court to rule on the facial validity of the statute before any other matters, representing that this would moot these remaining matters.

Plaintiffs moved to strike DeKalb affidavits on a number of grounds that were briefed extensively. The court finds that it need not do so, however, because it finds that DeKalb County has failed to meet its burden of adducing any evidence suggesting that a genuine question of material fact exists. Further, the matters raised in the affidavits purport to insinuate defenses to the Plaintiffs' claims. Legal conclusions about

homeroom time, speculations about a witness' thoughts and motives, contradictions of earlier materials in the record while still offering admissions, and espousals of the theory that patriotism or national crisis justifies violation of the Establishment Clause do not meet the burden of resisting summary judgment here.

Asking the court to decide the facial issue first is not evidence. Likewise, the court has already rejected the Governor's theory that the Free Exercise Clause negates the Establishment Clause:

> Although the Establishment Clause works with the Free Exercise Clause to fully safeguard our religious freedom, there is an inherent tension between the two clauses. If the Free Exercise Clause were an absolute mandate, it would subsume the Establishment Clause. Paradoxically, making "Free Exercise" an absolute mandate would. . . effectively destroy "freedom of religion" as we know it.
>
> . . .
>
> Although the Free Exercise Clause guarantees complete freedom of belief, the guarantee does not extend to protect all religious activity. . . . If the Free Exercise Clause protected all religious activity, it would not be possible to maintain a civil, pluralistic society. . . . Similarly it is easy to see how the absolute protection of religious

> activity would quickly lead to an establishment of religion.

March 1997 Opinion and Order at 6-7 (internal citations omitted).

In response to the argument that the statute, by allowing "nonproselytizing, nonsectarian student initiated prayers at compulsory and noncompulsory school-related events," did no more that set forth the students' Free Exercise rights, the court has noted:

> Under the dictates of the Establishment Clause and Supreme Court decisions, students do not have an absolute right to engage in such prayer. While the defendant argues that the statute does no more than recognize students' free exercise and free speech rights, the Court will not ignore the plain meaning of the statute . . . . section 16-1-20.3 . . . authorizes religious activity in our public schools which is plainly unconstitutional.

March 1997 Opinion and Order at 36 n.31.

The court likewise finds no merit in the argument that state action is lacking. This argument, too, has been rejected by the court in its March 1997 Opinion and Order. In discussing the constitutionality of "voluntary" or "student-initiated" prayer, the Court discussed the relationship between student choice and state action:

> Moreover, in the public school setting, federal courts have repeatedly struck down legislation

> and practices permitting prayer, even when the prayer at issue was ostensibly "voluntary" or "student-initiated." For example, in *Engel v. Vitale*, the Supreme Court declared unconstitutional a school district's practice of having students recite aloud a non-denominational prayer even though students were free to elect not to participate.
>
> . . .
>
> Similarly, because the resources and facilities of the state are utilized when a "student-initiated' prayer is given in public schools, those hearing the prayer may be led to believe the state is associated with or endorses either the speaker's religion, or religion over non-religion.

March 1997 Opinion and Order at 10-11.

As to all of Plaintiffs' claims, the court rejects the apparent *de minimis* argument. The Governor argues that nonpervasive First Amendment violations are unworthy of the court's notice. (*See* Gov. Br. at 17 (prayer before a football game is "a minute part of the program;) Gov. Br. at 14 (any incidental religious comment does not work an establishment of religion"); Gov. Br. at 12 (no constitutional violation occurs where religious activities are not "pervasive"); *see also* Powell Aff., ¶ 5 (Gideon presentation was "short").) The argument is, as already noted, unavailing. *See Engel*, 370 U.S. at 436; *Schempp*, 374 U.S. at 224-25.

Most recently, in *Lee v. Weisman*, the Supreme Court was again confronted with the claim that a brief "nonsectarian" prayer occurring once in a lifetime was a de minimis act. The Court again rejected the de minimis argument:

> It is, we concede, a brief exercise during which the individual can concentrate on joining its message, meditate on her own religion, or let her mind wander. But the embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers, and similar ones to be said in the future, are of a de minimis character. To do so would be an affront to the Rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority . . . [T]he intrusion was both real and, in the context of a secondary school, a violation of the objectors' rights.

Lee, 505 U.S. at 594.

In *Jager v Douglas County School District*, 862 F.2d 824 (llth Cir.), *cert. denied*, 490 U.S. 1090 (1989), Judge Johnson rebuffed the school district's contention that a prayer of 60 to 90 seconds is a "*de minimis* violation." Id. at 832. Judge Johnson wrote:

> This approach is flawed. It is 'no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment'.

> . . . The Establishment Clause does not focus on the amount of time an activity takes, but rather examines the religious character of the activity. As the Fourth Circuit recognized . . . '[a] prayer, because it is religious does advance religion and the limited nature of the encroachment does not free the state from the limitations of the Establishment Clause.'

Id. (internal citations omitted).

Nothing in the evidence rescues the Defendants from the mandates of *Celotex*. Nothing in the evidence suggests either a valid defense or a genuine question of material fact. The Defendants' affidavits do not do so. Accordingly, the court finds that summary judgment is due to be granted.

ORDER

Based on the foregoing, it is hereby CONSIDERED and ORDERED that:

That portion of the court's October 31, 1997 Order denying as moot. Plaintiffs' September 27, 1996 Motion For Partial Summary Judgment be and the same is hereby VACATED. All other aspects of the court's October 31, 1997 Order shall remain in full force and effect.

Plaintiffs' September 27, 1996 Motion For Partial Summary Judgment be and the same is hereby GRANTED.

The court's Supplemental Opinion and Order, issued concomitantly, on this date, with this Memorandum Opinion and

Order shall be and the same is hereby INCORPORATED BY REFERENCE into this Supplemental Opinion and Order.[14]

DONE this the 12th day of November, 1997.

/s/ Ira DeMent

UNITED STATES DISTRICT JUDGE

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[14]See the court's Supplemental Opinion and Order, also issued on this date, at footnote 53 and accompanying text.

Appendix G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-6898, 97-6953

MICHAEL CHANDLER, individually and as
next friend of his son, Jesse Chandler,
et al.,

Plaintiffs-Appellees,

versus

FOB JAMES JR., in his official capacity as
Governor of the State of Alabama and
President of the State Board of Education,
et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the
Middle District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, _____ F.3d _____).

Before: TJOFLAT, Circuit Judge, and GODBOLD and HILL, Senior Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED, and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/

James C. Hill
SENIOR UNITED STATES CIRCUIT JUDGE

Appendix H

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ALABAMA'S SCHOOL-PRAYER STATUTE

ALABAMA CODE § 16-1-20.3

(a) The legislative intent and purpose for this section is to protect the freedom of speech guaranteed by the First Amendment to the United States Constitution and Article I,

Section 4 of the Constitution of Alabama of 1901, to define for the citizens of Alabama the rights and privileges that are accorded them on public school and other public property and at school-related events, and to provide guidance to public school officials on the rights and requirements of law they must apply. Further, the intent and purpose of the Legislature is to properly accommodate the free exercise of religious rights of its student citizens in the public schools and at public school events as mandated by the First Amendment to the United States Constitution and the judicial interpretations thereof as given by the United States Supreme Court.

(b) On public school, other public, or other property, non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benedictions, shall be permitted during compulsory or non-compulsory school-related student assemblies, school-related student sporting events, school-related graduation or commencement ceremonies, and other school-related student events.

(c) Nothing in this section shall otherwise diminish the right of any student or person to exercise his or her rights of free speech and religion, including prayer, as permitted by the United States Constitution and the Alabama Constitution on public school or other public property, or other property, at times or events other than those stated in subsection (b).

(d) The exercise of these rights on public school or other public property, or on other property for school- related activities, by students or others, shall not be construed to

indicate any support, approval, or sanction by the State of Alabama, any political subdivision thereof, municipal corporation, governmental entity of any description, or any agent or employee of any governmental entity of the contents of any such prayer, invocation, benediction, or other activity, or be an unconstitutional use of any public school property or other public property, or be the promotion or establishment of any religion or religious belief.

Ala. Code § 16-1-20.3 (1995).

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

MICHAEL CHANDLER, et al.,

Plaintiffs,

v. CASE NO. 96-D-169-N

FOREST H. "FOB" JAMES, JR.,

et al.,

Defendants.

PARTIES' JOINT MOTION TO VACATE THIS COURT'S ORDER AND AGREEMENT OF VOLUNTARY CESSATION OF CERTAIN ACTIVITY PENDING THIS COURT'S DECISION

COME NOW Plaintiffs and Defendants, and jointly move this Court for an Order vacating its February 9, 1996, Order and state as follows:

1. On February 1, 1996, the above-styled lawsuit was filed, alleging violations of the Establishment Clause of the U.S. Constitution.

2. In conjunction with the Complaint, the plaintiffs sought a preliminary injunction. The plaintiffs seek to enjoin

certain activities which they allege are occurring in the public schools of DeKalb County and the City of Talladega and which are described in the Complaint and Declarations filed contemporaneously with the Complaint. The plaintiffs also contend that many of these alleged activities are undertaken pursuant to Ala. Code § 16-1-20.3 (1975).

3. Defendants deny the allegations of the Complaint and Amended Complaint and further deny that Ala. Code § 16-1-20.3 (1975) is unconstitutional. Defendants submit that even if the activities which are alleged in the Complaint and Amended Complaint are occurring in the public schools of DeKalb County and the City of Talladega, such alleged activities are not unconstitutional or violative of law.

4. Defendant James takes the position that he is not able to determine what activities may have heretofore been engaged in by other defendants, i.e., school officials or agents and school boards, and is not in a position to determine or dictate immediate future actions by them. Accordingly, Defendant James cannot agree that the actions listed in paragraph 6 below should cease. Otherwise, Defendant James

is in agreement with the Motion. The Plaintiffs do not agree with the position taken by Defendant James and do not waive any rights against him by execution of this *Motion.*

5. Defendant Sessions acknowledges that the activities agreed upon in paragraph 6 are purely local in nature and in as much as the local officials and Defendants have agreed to this restriction, he has no objection to their agreement. The Plaintiffs do not agree with the position taken by Defendant Sessions and do not waive any rights against him by execution of this Motion.

6. Without admitting any liability for and without waiving any defenses to the claims asserted herein, the defendants agree to cease the following activities pending the Court's determination of their constitutionality:

(a) prayers, whether student-initiated or otherwise, at school-sponsored sporting events that use public address systems;

(b) prayers and devotionals, whether student-initiated or otherwise, at school-sponsored assemblies, held during the school day, including D.A.R.E. events and 4-H Club events; except that noncurricular clubs may meet during noninstructional time;

(c) prayers and devotionals during classroom time during the school day; except that students have the right to pray, individually and nondisruptively, except when required to be actively engaged in school activities, e.g., students may not decide to pray just as the teacher calls on them;

(d) distribution of religious literature, including Bibles and invitations to religious events, to students by school officials or non-school persons during the school day on school premises; however, students and non-school persons have the right to distribute religious literature on school premises during noninstructional time, subject to the same reasonable time, place and manner restrictions imposed on the distribution of all non-school literature;

(e) prayers and devotionals, whether student-led or otherwise, at school-sponsored graduation ceremonies;

(f) the meetings of student Bible clubs, including the meetings of the Fellowship of Christian Students, occurring during instructional time; however, all noncurricular student clubs may be allowed to meet pursuant to the Equal Access Act during noninstructional time.

7. The prohibitions in paragraph 6 of 'student-initiated' prayers, devotionals, or other activities, is not meant to

prohibit purely personal expression by a student during noninstructional time so long as that expression is not the product of any school-

or student-organized effort. In addition, the above provisions prohibit certain religious actions by school officials or otherwise in the Talladega City and DeKalb County Public Schools. In an effort to prevent these stated prohibitions from preventing or having a chilling effect on otherwise permissible First Amendment activities, the parties have agreed that the activities and conduct described in Exhibit A hereto may occur, subject to the provisions of paragraph 6 above.

8. The plaintiffs, without waiving any rights they may have to seek injunctive relief and without prejudice to any claims asserted herein, agree not to seek preliminary injunctive relief in reliance upon defendants' agreement to cease the activities described in paragraph 6 pending a determination of their constitutionality.

9. In the event that the United States Court of Appeals for the Eleventh Circuit or the Supreme Court of the

United States renders a decision which a party reasonably believes affects his, her or its rights and responsibilities which are germane to this Motion, any such party may move the Court for a modification of this Motion and any agreement reflected in this Motion, submitting argument and authority to the Court. All parties shall be allowed to respond and to offer any argument or citation of authority to the Court in opposition to any motion for modification.

PAMELA L. SUMNERS
Ala. Bar No. 431-35-6898
2214 Third Avenue North, Ste 206
Birmingham, AL 35203
205/320-0200
One of the attorneys for Plaintiffs

A. ERIC JOHNSTON
2100-A Southbridge Parkway
Southbridge Building
Suite 376
Birmingham, AL 35209
205/879-9220

One of the attorneys for
Defendant James

DENISE B. AZAR
ASHLEY H. HAMLETT
Office of General Counsel
Alabama Department of Education
Post Office Box 302101
Montgomery, AL 36130-2101

Attorneys for State Board of
Education

JEFFREY H. LONG
Office of the Attorney General
State of Alabama
11 South Union Street
Montgomery, AL 36130
Attorney for Defendant Sessions

JAMES E. WILLIAMS
Melton, Espy, Williams & Hayes
Post Office Drawer 5130
Montgomery, AL 36103-5130
334/263-6621

One of the Attorneys for
Defendants Weldon Parrish and
members of the DeKalb County
Board of Education; Charles A.
Kearley, and members of the
Talladega City Board of Education

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served a copy of the foregoing upon the listed counsel of record by placing same in the United States Mail, postage prepaid and properly addressed, on this the 13th day of March, 1996.

Ralph Gaines, Esq.
GAINES, GAINES & RASCO, P.C.
127 North Street
Post Office Box 275
Talladega, AL 35161

William D. Scruggs, Esq.
SCRUGGS, JORDAN & DODD
Post Office Box 1109
Fort Payne, AL 35967

James Tucker
ACLU of Alabama
Post Office Box 447
Montgomery, AL 36101

Steven Green
Americans United for Separation
of Church and State
1616 Jefferson Place, N.W.
Washington, D.C. 20036

Stephen L. Pevar
American Civil Liberties Union Foundation
511 16th Street
Suite 300
Denver, CO 80202

OF COUNSEL

EXHIBIT A

1. The Establishment Clause of the First Amendment does not prohibit purely private religious speech by students. Students have the same right to engage in individual or group prayer and religious discussion during the school day as they do to engage in other comparable non-disruptive activities. Local school authorities possess substantial discretion to impose rules of order and other pedagogical restrictions on student activities, but they may not structure or administer such rules to discriminate against religious activity or speech.

   Generally, students may pray in a nondisruptive manner when not engaged in school activities or instruction, and subject to the rules that normally pertain in the applicable setting. Specifically, students in informal settings, such as cafeterias and hallways, may pray and discuss their religious views with each other, subject to the same rules of order as apply to other student activities and speech. Students may also speak to, and attempt to persuade, their peers about religious topics just as they do with regard to political topics. School officials, however, should intercede to stop student speech that constitutes harassment aimed at a student or a group of students.

2. Subject to the same rules of order as applied to others, students may pray in a non-disruptive manner when not engaged in school activities or instruction and may pray or discuss their religious views with one another in informal settings, such as cafeterias and hallways.

3. Students may speak to, and attempt to persuade, their peers about religious topics. School officials, however, should intercede to stop student speech that constitutes harassment aimed at a student or a group of students.

4. Students have a right to distribute religious literature to their school mates on the same terms as they are permitted to distribute other literature that is unrelated to school curriculum or activities. Schools may impose the same reasonable time, place, and manner or other constitutional restrictions on distribution of religious literature as they do on non-school literature generally, but they may not single out religious literature for special regulation.

5. Students may display religious messages on items of clothing to the same extent they are permitted to display other comparable messages. Students may wear religious clothing or articles, e.g., the Jewish yarmulke.

6. Under the Equal Access Act, student religious groups at public secondary schools, i.e., seventh through twelfth grades, have the same right of access to school facilities as is enjoyed by other comparable student groups. Those schools receiving federal funds that allow one or more student non-curriculum related clubs to meet on their premises during non-instructional time may not refuse access to student religious groups.

7. A school receiving federal funds must allow student groups meeting under the Equal Access Act to use the school media to announce their meetings on the same terms as other non-curriculum related student groups are allowed to use school media. Schools may, however, inform students that certain groups are not school sponsored.

8. A school creates a limited open forum under the Equal Access Act when it allows students to meet during their lunch period or other non-instructional time during the school day, as well as when it allows students to meet before and after the school day. In such circumstances, the student religious group is entitled to meet at school during these times.

9. If a school generally opens its facilities to private groups during noninstructional time, it must make its facilities available on the same terms to organizers of privately sponsored religious baccalaureate services and other religious events.

10. Students' and parents' rights concerning psychiatric or psychological and religious or other inquiry shall be observed and protected as provided in 20 U.S.C. § 1232h (see 34 C.F.R. § 98).

11. Any other religious conduct permitted under decisions of Federal Court in the Eleventh Circuit and the Supreme Court of the United States.

Supreme Court, U.S.
FILED
JAN 21 2000
CLERK

(2)

No. 99-935

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL CHANDLER, *et al.*,
Petitioners,

v.

FORREST H. "FOB" JAMES, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF *AMICUS CURIAE* OF THE INTERFAITH ALLIANCE AND THE HORACE MANN LEAGUE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PROF. FRANK S. RAVITCH*
Oldfield Law Building
6441 East Colonial Drive
Orlando, FL 32807-3673
(407) 275-2000 ext. 245

*Counsel of Record

24pp

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INTEREST OF THE *AMICUS CURIAE*[1]

THE INTERFAITH ALLIANCE

The Interfaith Alliance is a national grassroots organization headed by clergy and concerned lay people of faith. The Interfaith Alliance and its 109 local alliances and aligned groups in 35 states uphold the positive role that religion can play in public life. We recognize that diversity and tolerance are essential components of our democratic tradition and that they must be promoted, preserved, and celebrated. Mainstream religious leaders from across the country organized the Interfaith Alliance in 1994 to speak out against the divisive use of religion in the public square.

THE HORACE MANN LEAGUE

The Horace Mann League of the United States of America was founded by a group of leading educators in 1922 to perpetuate the ideals of Horace Mann, founder of the American public school system. The League believes that the public school system of the United States is an indispensable agency for the perpetuation of the ideals of our democracy and a most necessary unifying and dynamic influence in American life. Our public schools should be free, class .less, non-sectarian, and open to all children. Accordingly, the League believes that the American tradition of separation of church

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1 The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amicus curiae*, their members, and their counsel, made a monetary contribution to the preparation and submission of this brief.

and state must be preserved inviolate and should be most vigorously and zealously safeguarded.

ARGUMENT

The Eleventh Circuit's decision allowing organized, student initiated prayer at school controlled forums such as graduation ceremonies, sporting events, and assemblies, threatens both freedom of speech and religion. This is so because the Eleventh Circuit decision ignores this Court's carefully laid out public forum doctrine, and in the process fails to recognize the difference between government toleration of private speech and government sponsorship of it. This is a classic case of a government entity favoring the viewpoint of the majority, while excluding other viewpoints. Cloaking religious favoritism in the garb of free speech may disguise it, but it does not undo it.

The Eleventh Circuit's decision also undermines this Court's Establishment Clause precedents. It overlooks the very real coercive effects that exist when adherents of the majority faith commandeer school events and equipment to exercise their beliefs with the tacit approval of government officials. Moreover, it fails to recognize that endorsement can exist at school controlled events regardless of whether prayers are "commanded" or "permitted" by those with the power to do so.

I. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S FREE SPEECH CLAUSE DECISIONS

This case is about organized prayer at school events, and not about censorship of "private" prayer. It is axiomatic that students may pray privately and even proselytize their fellow students at school during free periods, or whenever they may speak freely about non-curriculum related subjects. *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990); U.S. DEPT. OF EDUCATION, PRESIDENTIAL GUIDELINES ON RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS (Aug. 1995, *revised* May 1998); *See also Lee v. Weisman*, 505 U.S. 577, 629-630 (1992)(Souter, J., concurring)(graduating students "may express their religious feelings" before and after commencement, and at privately sponsored baccalaureate ceremonies). The injunction the Eleventh Circuit vacated explicitly acknowledged the same. (Pet. App. D.) The prayer involved in this case is not of this "private" type. Yet the Eleventh Circuit decision treats school-sponsored sectarian prayer delivered over the intercom as "private" so long as the supplicant is not a school board employee. No basis exists among this Court's precedents for this remarkable conclusion.

The Eleventh Circuit's decision suggests that even if a school district has created an arena in which majoritarian religious speech is clearly favored, it may justify such favoritism based on the free speech rights of the speaker. Thus the panel's decision distorts the Free Speech Clause. If allowed to stand, it will wreak havoc with the public forum doctrine established by this Court and will foster an environment hostile to the speech and religion rights of

those required by law to go to school who do not share the majority faith or viewpoint.

A. The Decision Sanctions Viewpoint Discrimination

By suggesting that students and others have a free speech right to engage in organized, public prayer at school-sponsored events, the Eleventh Circuit draws an artificial line between government speech and private speech. *Chandler v. James*, 180 F.3d 1254, 1257 n.6, 1264 (11th Cir. 1999). Having extracted the prayer in question from the realm of government action (even when government facilities are used to deliver it in a captive audience setting), the opinion suggests that preventing such prayer somehow reflects hostility toward religion and interferes with private speech rights. *Id.* at 1261. Thus, the reasoning goes, allowing such organized prayer at school events does not run afoul of the Establishment Clause, but in fact, prevents violations of the Free Speech Clause.

This reasoning is specious, and when carefully analyzed it leads to violations not only of the Establishment Clause, but of the Free Speech Clause. That is the ultimate irony of the decision.

A simple review of the record in this case when evaluated under this Court's free speech doctrines demonstrates the massive flaws in the Eleventh Circuit's analysis. Both in their substance and application, DeKalb County's policies and practices favored religious speech and favored the speech of the religious majority. DeKalb County permitted sectarian Christian prayers over loudspeakers at school events. It permitted Christian ministers to

deliver religious remarks at school assemblies. It permitted New Testament distributions by Gideons, and permitted numerous other sectarian, always Protestant, practices. (*See* Pet. Br. at 3-7.)

The record is devoid of any evidence that DeKalb County made its events or equipment available to persons wishing to express any other viewpoint. No Catholic, Jewish, Muslim, or other non-favored prayer was ever given, and the environment fostered by school officials was not conducive to the expression of minority religious views.

Sponsorship of, and favoritism toward, religious speech is the net effect of DeKalb County's permitting prayers and religious exercises to the exclusion of other speech. This results in discrimination against non-majoritarian religious speech and non-religious speech.[2] This type of government sanctioned viewpoint discrimination is prohibited by the Free Speech Clause. *Rosenberger v. Rectors and Visitors of the Univ. of Virginia*, 515 U.S. 819, 828-830 (1995); *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 641-6143 (1994); *See also Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995)(acknowledging that when government favors religious speech in a public forum it endorses that speech and engages in content discrimination).

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2 As this Court has acknowledged, even in a traditional public forum one kind of speech can so dominate that content discrimination results. *Cf. Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995)("giving sectarian religious speech preferential access to a forum....would violate the Establishment Clause" and the Free Speech Clause because "it would involve content discrimination").

Conversely, if the decision is read as envisioning school-sponsored events as equal access events for free speech purposes (thus putting the best face on the decision), the Eleventh Circuit has created a regime of chaos rather than viewpoint discrimination.[3]

Imagine a graduation ceremony where a speaker is on stage surrounded by school officials and teachers, with parents and happy graduates in the audience. The speaker, who may be a student or nonschool "other," says a prayer to which several persons, including students, object for different reasons. Each wants the opportunity to respond and walks on-stage to offer an alternative prayer or statement. Or imagine a pre-game prayer at a sporting event that causes twenty students or others with differing viewpoints to want equal time to state their prayers or objections. None should have his prayer curtailed since the Eleventh Circuit declared a general free speech right for students and others to pray. This situation, which the decision might well create, would drastically change the understood nature of graduation ceremonies and kickoff times, not to mention other school activities.

Constraints of time and the risk of coercion or attribution of the speaker's message to the government sponsoring it exist because public schools are not public squares. The Eleventh Circuit, by sanctioning either viewpoint discrimination or chaos, ignored these realities or failed to recognize them. The result distorts both freedom of speech and religion.

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3 Such equal access never occurred in DeKalb County. Only tongue-in-cheek could one contend that DeKalb County school officials have or will create a generalized platform for non-favored speech.

B. Public Schools are not Public Squares

The Eleventh Circuit decision seems to assume that a public forum existed at the events in question, but does not directly address the issue, despite the fact that the existence of a public forum is a prerequisite to the free speech analysis upon which the court purported to rest its decision.[4] Absent a public forum, for example, nonschool others do not have the right of access to public schools for speech purposes conferred on them by the Eleventh Circuit. *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 390, 392-393 (1993); *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46, 48-49 (1983).

In the public square a citizen may freely express his or her views without government officials controlling the event, and without a captive audience. *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 266-267 (1988); *Perry*, 460 U.S. at 45; *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939). Those who oppose the views may use the same forum for stating their opposition or they may

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4 Since the Eleventh Circuit never identifies the basis for the right to engage in such expressive activity at school controlled events, the court must have assumed either a public forum, a designated public forum, or some sort of "super-*Tinker*" right. As this sub-section demonstrates, the first two options are inconsistent with the record and this Court's public forum doctrine. The third possibility is in direct conflict with *Hazelwood*, 484 U.S. 260, 266-267, 270-273 (in school-controlled fora the school need not tolerate all student speech), and, *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986)(same).

simply walk away. In the public school context, quite the opposite is true because of the unique constraints of the school setting. If, for example, students opposed prayers given at an assembly, over the loudspeaker at a football game, or from the podium at a graduation ceremony, they could not simply walk up and commandeer the podium and respond.

A school controlled event is not a public forum unless the school so designates. When a school creates a designated public forum, the rules of a traditional public forum apply.[5] *Perry*, 460 U.S. at 45-46. Under these circumstances, opposing speakers must be given equal time and resources. The state may not favor religious speech, and must allow open communication and debate, absent a regulation narrowly drawn to achieve a compelling state interest. *Perry*, 460 U.S. at 45; *Widmar v. Vincent*, 454 U.S. 263 (1981); *Hague*, 307 U.S. at 515.

Herein lies the paradox. If DeKalb County suggests that its school events were some sort of a public forum, they undermine their own case. For if a public forum or a designated public forum existed at the events in question, DeKalb County engaged in a systematic pattern of viewpoint discrimination against minority views and discrimination against nonreligious speech generally. The record, of course, belies any pretense of a public forum up until the time the Eleventh Circuit seemingly created one (without reference to the record). What DeKalb County had was in fact a platform for prayer that other speech did not share. Of course, this violates the Establishment Clause, but it also violates the Free Speech Clause.

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5 The school can limit the types of speakers to those relevant to the forum, such as students. *Perry*, 460 U.S. at 48.

Thus, the Eleventh Circuit's decision cloaking religious favoritism as Free Speech is especially dangerous and troubling.

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S ESTABLISHMENT CLAUSE DECISIONS

A. The Panel's Decision Contradicts This Court's Decision in *Lee v. Weisman*, and Places the Burden of Avoiding Religious Compulsion on Nonconforming Students

The Eleventh Circuit's decision inverts the principles underlying this Court's Establishment Clause jurisprudence. In *Lee v. Weisman*, 505 U.S. 577 (1992), this Court held that graduation prayer at school-sponsored events violates the Establishment Clause because it coerces dissenting students to participate in a religious exercise. The Eleventh Circuit found organized prayer at school-controlled events that is led by persons other than school officials distinguishable from the unconstitutional prayer in *Lee* because in *Lee* a school official chose a member of the clergy to deliver the prayer and issued guidelines for it. *Chandler v. James*, 180 F.3d 1254,1257, 1263-64 n.13, n.16. (11th Cir. 1999).

The artificial distinction drawn by the Eleventh Circuit is spurious when judged against *Lee*. The prayer in *Lee* was not coercive merely because a principal influenced it; it was coercive because it occurred at a school-sponsored, controlled, and funded event that was essentially obligatory. *Lee*, 505 U.S. at 593-597; *ACLU v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1478-83 (3d Cir. 1996)(en banc). Had this Court meant in

Lee that religious exercises at a school-sponsored event were unconstitutional only to the extent that a school official gave guidelines, this Court would have had no need to ground its holding in large measure on the effect of the prayers on persons who were compelled to participate. *See Lee*, 505 U.S. at 592-597.

The remainder of the Eleventh Circuit's treatment of *Lee* is even less respectful. The Eleventh Circuit transformed *Lee*'s concern with the rights of captive dissenters to nothingness: "Those who do not espouse a speaker's religious beliefs are free not to listen, and to express their disagreement by not participating in any way." *Chandler*, 180 F.3d at 1263. The panel indicated its belief that *Lee* sanctioned "social isolation or even anger" as "the price of conscience or nonconformity." *Id.* (*quoting Lee*, 505 U.S. at 597).[6] This, the Eleventh Circuit has decreed, is the price of liberty in America. *Chandler*, 180 F.3d at 1263.

The Eleventh Circuit also overlooked the dynamics of the school setting and the coercive pressures operating there. *See Lee*, 505 U.S. at 592-594. This Court has never required silent participation or standing in the hallway in order to escape religious compulsion in the public schools. *Lee*, 505 U.S. at 594-596; *School District of Abington Township v. Schempp*, 374 U.S. 203, 287-90 (1963)(Brennan, J., concurring).

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6 How thoroughly this language is ripped from its context is apparent from reading the very next sentence in *Lee*, not to mention the entire opinion. *Lee* does not sanction callousness toward dissenting schoolchildren.

B. The Activities at Issue Pose a Special Threat to Religious Minorities and Dissenters, and are Exceptionally Coercive

The Eleventh Circuit's decision ignores history, social context, and common sense by finding that it is not coercive or an endorsement of religion to favor the prayer of the religious majority, even when that prayer occurs at school sponsored and controlled events. Unfortunately, there is a long and tortured history in this nation of religious exercises in the public schools facilitating violence against religious minorities and dissenters, either because they did not participate or because they objected to those exercises. *See generally* FRANK S. RAVITCH, SCHOOL PRAYER AND DISCRIMINATION: THE CIVIL RIGHTS OF RELIGIOUS MINORITIES AND DISSENTERS (Northeastern Univ. Press 1999). From the anti-Catholic violence of the 1840's to cases in the last few years,[7]

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7 In the Nineteenth Century violence against Catholics was facilitated by school prayer and bible reading. Ravitch, SCHOOL PRAYER AND DISCRIMINATION at 4-7; Lloyd P. Jorgenson, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925 (Univ. of Missouri Press 1987) at 76-83; James Hennesey, AMERICAN CATHOLICS: A HISTORY OF THE ROMAN CATHOLIC COMMUNITY IN THE UNITED STATES (Oxford Univ. Press 1981) at 122-125; Leo Pfeffer, GOD, CAESAR, AND THE CONSTITUTION (Beacon Press 1975). Sadly, while the level of bloodshed may be lower today, recent cases demonstrate the violent conflict that can be facilitated by school prayer. *See* Ravitch, SCHOOL PRAYER AND DISCRIMINATION at 7-18.

school prayer has called attention to difference, and it has frequently been peers at school who have exploited that difference in a persecutorial fashion. *Id.* (documenting a number of cases, both reported and unreported, of discrimination against religious minorities and dissenters facilitated by school prayer); *Bell v. Little Axe Independent School Dist. No. 70*, 766 F.2d 1391, 1397 (10th Cir. 1985)(documenting vitriolic incidents of harassment and discrimination aimed at two families that objected to majoritarian religious activity in a public school). The discrimination and violence has been especially pronounced when school officials have fostered an environment such as that in DeKalb County.[8]

A vast array of data indicates that religious harassment and discrimination against members of religious minorities are reinforced when student adherents of the majority religion perceive that their religious views are favored by school officials. Thus, when school officials permit school-controlled settings to be used for religious exercises the effects may extend beyond endorsement and coercion to discrimination.

Moreover, the pressure, ostracism, and marginalization that caused this Court to strike the rabbi's prayer in *Lee* may be magnified when the prayer is given by a peer with the support of a majority of one's peers,[9] at an event controlled by the government.

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8 *See* discussion of the *Herring*, *Herdahl*, *Bell*, and *Bauchman* cases in Ravitch, SCHOOL PRAYER AND DISCRIMINATION at 8-16.

9 This does not minimize the fact that the Eleventh Circuit's opinion allows prayer by either clergy or a student. Under that decision, clergy may demand the podium upon a claim of generalized First Amendment rights to the same extent that a student may. *Chandler*,

See generally Ravitch, SCHOOL PRAYER AND DISCRIMINATION. Numerous studies from a variety of disciplines demonstrate that the peer pressure and coercion discussed in *Lee* is far more pronounced when a student's peers are engaging in religious activity with the direct or tacit permission of school authorities.[10] Although often dependent upon the religious demographics in a given location, the dynamics, and the attendant discrimination and harassment, are relatively predictable.

All of this data makes one point painfully obvious- school prayer generally, and especially when supported by a majoritarian sentiment with tacit government approval, is especially coercive, alienating, and potentially violence- producing. Therefore, both from an endorsement and coercion perspective, organized public prayer at school-controlled events, even if student-initiated, produces the divisiveness from the government's pulpit the Establishment Clause was designed to prevent. *Lee*, 505 U.S. at 591-592; *Id.* at 606-607 & n.10 (Blackmun, J. concurring); *Id.* at 630 (Souter, J., concurring); *Grand Rapids v. Ball*, 473 U.S. 373, 382-383 (1985); *Engel v. Vitale*, 370 U.S. 421 (1962).

The Eleventh Circuit failed to recognize what this Court

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180 F.3d at 1257 n.6.

10 For a discussion of, and citation to, numerous studies from the social sciences demonstrating the impact of peer pressure and authority figure behavior on students, as well as the connection between religious orientation and discrimination, *See* Ravitch, SCHOOL PRAYER AND DISCRIMINATION at Chapter Four.

recognized in *Lee* and what James Madison recognized in his famous Federalist No. 51:

> In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects.....In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in the state of nature, where the weaker individual is not secured against the violence of the stronger....

James Madison, "Federalist No. 51," *in* THE FEDERALIST PAPERS (Clinton Rossiter ed., Penguin Books 1961).

Madison understood that a central aspect of religious freedom is that government may not choose among the multiplicity of sects that which it will favor. An environment such as that fostered by DeKalb County, where a majority can dictate the religious exercises the minority must explicitly or implicitly participate in at school-controlled events, where school policies foster majoritarian religious rule at school-controlled events, where such practices were formally endorsed by a state statute, and where religious harassment may be aimed at those who oppose the prevailing views, subverts Madison's vision. He understood both the danger to individual freedom posed by factional domination and that in the religious context factional domination is especially

dangerous. James Madison, "Federalist No. 10," *in* THE FEDERALIST PAPERS (Clinton Rossiter ed., Penguin Books 1961). The hostility toward those who do not share the dominant faith in the present case demonstrates the salience of Madison's vision.

To the extent that the Religion Clauses embody Madison's vision of equal protection for minority religious sects, DeKalb County's policies are more dangerous to religious freedom than the prayer struck in *Lee*, because they empower a majoritarian religious faction to routinely use the machinery of the state to force a captive audience to participate explicitly or implicitly in sectarian religious activity in school-controlled settings. This is the type of situation Madison feared, this Court has proscribed, and the Eleventh Circuit now allows.

C. The Eleventh Circuit's Focus On Whether Officials "Permitted" Or "Commanded" The Religious Exercises Is Misplaced

The Eleventh Circuit tries to avoid the logical result of *Lee* and this Court's other Establishment Clause precedents by creating a dichotomy between "permitting" prayer and "commanding" it in the closed environment of the school setting. *Chandler*, 180 F.3d at 1264. Thus, the panel held that it is acceptable for a school to "permit" students and others to give organized, public prayers in classrooms, at assemblies, and over loudspeakers at football games and graduations. According to the Eleventh Circuit, even ministers may speak at school-controlled events so long as the school does not "command" prayer. *Id.* at

1257 n.6, 1264. This dichotomy is especially troubling because it not only flies in the face of this Court's First Amendment holdings, but is exceptionally formalistic and ignores the overwhelming and uncontested facts of the case.[11]

The word "permit" does not imply the passivity that the Eleventh Circuit suggests it does, especially when the literal definition is considered in context. The Oxford Desk Dictionary defines "permit" as follows: "1. Give permission or consent to; authorize; allow. 2. Give an opportunity (to)....." THE OXFORD DESK DICTIONARY (American Ed., Oxford U. Press 1995). Thus, "permitting" organized prayer at school controlled events is "authorizing" that prayer, consenting to it, and giving permission for it to occur in settings where government officials exercise plenary control. Both doctrine and common sense tell us that a public school cannot authorize prayer at school-controlled events, using school equipment, without both endorsing that prayer and coercing non-believers. *Lee*, 505 U.S. at 593-597; *Engel*, 370 U.S. at 430-431, 435; *Black Horse Pike*, 84 F.3d at 1478-88; *Gearon v. Loudoun County Sch. Bd.*, 844 F.Supp. 1097 (E.D.Va. 1993).

For this reason, the "permit/command" dichotomy does not save DeKalb County's policies and practices under any of the tests used by this Court in Establishment Clause cases. The permit/command distinction cannot solve the coercion problem. It does not matter whether a speaker is picked by the principal,

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11 The record demonstrates that school officials carved out time at graduations for invocations and benedictions. (Pet. App. E40-47). Further, the statute at issue used the word "permit," so it is natural that in enjoining applications, the injunction should speak in terms of what is not permitted.

students, or self-selects by laying claim to generalized First Amendment rights. When prayer occurs in a captive audience setting controlled and sponsored by the school coercion exists.

Similarly, the permit/command dichotomy is at odds with this Court's precedents on government endorsement of religion. *County of Allegheny v. ACLU*, 492 U.S. 573, 592-594 (1989); *Wallace v. Jaffree*, 472 U.S. 38, 59-61 (1985); *Lynch v. Donnelly*, 465 U.S. 668, 690-691 (1984 (O'Connor, J., concurring). A significant focus of the endorsement test is whether government appears to take "a position on questions of religious belief," makes adherence "to a religion relevant in any way to a person's standing in the political community," *Allegheny*, 492 U.S. at 594; *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring), or sends the message that a particular religion, or religion in general is "favored," "preferred," or "promoted" over irreligion or other religious beliefs. *Allegheny*, 492 U.S. at 593-594; *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987). If DeKalb County "permitted" activities from the schools' pulpit that promoted religion generally, promoted majoritarian religious beliefs, or fostered an environment hostile to nonadherents, its practices fail the endorsement test. "Permitting" students or others to engage in religious exercises in school-controlled captive audience settings is the essence of endorsement.

The Eleventh Circuit expressed its belief that dissenters should express their tolerance for majoritarian prayer by silently enduring it. *Chandler*, 180 F.3d at 1263. When this Court's teachings that government may not make adherence to a religion relevant to a person's standing in the political community are ignored, however, tolerance does not follow. Discrimination does.

Finally, the artificial dichotomy between permit and command allows a school to engage in viewpoint discrimination and favoritism, a result completely at odds with this Court's holdings. *Rosenberger*, 515 U.S. at 828-830; *Turner Broadcasting, Inc. v. F.C.C.*, 512 U.S. at 641-643; *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *See also Capital Square Review Bd.*, 515 U.S. at 766 (acknowledging that when government favors religious speech it engages in content discrimination). The result of the Eleventh Circuit's decision will be especially painful for dissenters whose speech is effectively silenced by Dekalb County's policies and the atmosphere they foster, and who are further marginalized by the government's endorsement of majoritarian religious views.

D. The Eleventh Circuit's Treatment of "Proselytizing" Prayer is Erroneous

Closely related to the permit/command dichotomy is the Eleventh Circuit's limitation of "coercion" to proselytizing speech. Not only is this inconsistent with this Court's endorsement precedents, but it is also fundamentally at odds with *Lee*, which focused on subtle coercive pressures that inhere in the environment, not in the content of the speech. *Lee*, 505 U.S. at 592-597.

The Eleventh Circuit panel writes:

> [A] student's right to express his personal religious beliefs does not extend to using the machinery of the state as a vehicle for converting his audience.

> The Constitution requires that schools permit religious expression, not religious proselytizing..... Proselytizing speech is inherently coercive and, the Constitution prohibits it from the government's pulpit. (Citations omitted).

Chandler, 180 F.3d at 1265.

This statement illustrates the lack of depth in the panel's analysis. Since the Eleventh Circuit justified its decision to permit prayer at school-sponsored events based on the free speech rights of students and nonschool others, and on the absence of state action, it is especially odd that the panel would turn around and suggest that the same government which supposedly lacks control over any speakers except its own employees could censor the speech of "non-state actors" for proselytizing material. How may a student be a state actor for purposes of proselytizing speech but not sectarian speech, when the sectarian speech is also issued from the government's pulpit?

Moreover, divorcing the words of a prayer from its social context is either disingenuous or counterproductive. When a religious faction uses the machinery of the state to regularly reinforce its beliefs in captive audience settings, the effect is proselytizing, regardless of the words used. To pretend otherwise is to ignore the impact that constant reinforcement of a religious message (especially a majoritarian one) via the machinery of the state has on impressionable students subject to peer pressure. One need not utter the word "convert" to suggest that conversion to the dominant faith is the best path. It is no secret to most non-Christians that there is a proselytizing message inherent in a sectarian Christian

prayer aimed at a captive audience.

Ironically, the Eleventh Circuit's holding in this regard serves to underscore that the schools have significant control over the supposedly "private" free speech at issue in this case. That government control reinforces the absence of a public forum, the endorsement of the religious views expressed, and the government's influence over the environment in which those views are expressed.

CONCLUSION

For the reasons stated above, *amicus curiae* respectfully request that this Court grant the petition for writ of certiorari in this case.

Respectfully submitted,

PROF. FRANK S. RAVITCH
Oldfield Law Building
6441 East Colonial Drive
Orlando, FL 32897-3673
(407) 275-2000 ext. 245

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No. 99-935

IN THE

Supreme Court of the United States

MICHAEL CHANDLER, individually and as father and next friend of **JESSE CHANDLER**,

Petitioners,

vs.

DON SIEGELMAN, in his official capacity as Governor of the State of Alabama and as President of the State Board of Education, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

WILLIAM H. PRYOR JR.
ATTORNEY GENERAL OF ALABAMA
THOMAS F. PARKER IV
ASSISTANT ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL OF ALABAMA
11 South Union Street
Montgomery AL 36130
(334) 242-7372

**Counsel of Record*

JAY ALAN SEKULOW*
DEPUTY ATTORNEY GENERAL
WALTER M. WEBER
Suite 609
1000 Thomas Jefferson St., NW
Washington, DC 20007
(202) 337-2273

STUART J. ROTH
Center for Faith & Freedom Building
120 Ziegler Circle E.
Mobile, AL 36608
(334) 633-2154

Attorneys for Respondents Attorney General of Alabama, Alabama State Superintendent of Education, Members of State Board of Education, DeKalb County Superintendent of Education, and Members of DeKalb County Board of Education

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that public schools should treat genuinely student-initiated religious speech on equal terms with genuinely student-initiated secular speech?

2. Whether this Court should deny review of the court of appeals' nonfinal judgment vacating and remanding an injunction for redrafting where the district court will then be best situated to tailor any new injunction to reflect, inter alia:

   a. the concrete facts and circumstances of the case;
   b. the intervening mootness of many of plaintiffs' challenges; and
   c. any relevant aspects of this Court's forthcoming decision in *Santa Fe Independent School District v. Doe*, No. 99-62.

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STATEMENT OF THE CASE

Petitioner Michael Chandler brought suit on his own behalf and on behalf of his son Jesse, a minor. Chandler and his son challenged the constitutionality of both an Alabama statute, Ala. Code § 16-1-20.3, and alleged religious practices in the DeKalb County schools, under the First and Fourteenth Amendments to the United States Constitution. Chandler brought suit under 42 U.S.C. § 1983, naming as defendants in their official capacities the Governor of Alabama, the Attorney General of Alabama, the Alabama State Superintendent of Education, the members of the Alabama State Board of Education, the DeKalb County Superintendent of Education, and the members of the DeKalb County Board of Education. Chandler requested a declaration of the unconstitutionality of the Alabama statute and the challenged religious practices in the schools, an injunction prohibiting the challenged religious practices in the schools, and an award of attorney fees. Complaint ["Cplt."] at 18-19. Chandler did *not* seek damages. *Id. See also* Plaintiffs' Report on Status of Protective Order for Pseudonymous Pleading, Joint Motion to Vacate Trial Setting and Agreement Regarding Voluntary Cessation, and Joint Stipulations of Fact, p. 2 ("As the plaintiffs have stressed to various counsel, this suit is for injunctive relief, not damages").

At the time Chandler filed suit, he was an assistant principal at Valley Head School, a school operated by respondent DeKalb County Board of Education. Cplt. at 3. (Michael Chandler has since retired from that position.[1])

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[1]Chandler retired pursuant to a settlement agreement in a separate, employment-related lawsuit. *Chandler v. DeKalb County School Board*, (continued...)

Chandler's son Jesse was a seventh grade student at Fyffe School, a school operated by respondent DeKalb County Board of Education, at the time suit was filed on February 1, 1996. Cplt. at 3. He is now presumably in the eleventh grade.

On March 12, 1997, the district court granted partial summary judgment for Chandler, holding unconstitutional the challenged state statute, § 16-1-20.3. Pet. App. C1-C43. No party pursued an appeal from that decision.

On October 29, 1997, the district court issued a Permanent Injunction. Pet. App. D1-D19. This injunction imposed a complex set of restrictions, exceptions to the restrictions, and exceptions to the exceptions. Pet. App. D3-D12. For example, in paragraph 6(a), the injunction purported to restrict only "school organized or officially sanctioned religious activity in the classrooms," but nevertheless applied "regardless of whether the activity is initiated, led by, or engaged in by students." Pet. App. D4. The same provision explicitly permitted students "to quietly engage in religious activity during non-instructional times," but only "so long as it does not unduly call attention thereto and so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its imposition upon themselves." *Id.* D5.

Certain provisions of the injunction allowed DeKalb County school officials to treat student religious expression evenhandedly with other student expression, *e.g.*, *id.* D5, D12

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[1](...continued)
No. CV 96-PT-1000-M (N.D. Ala.). As part of that settlement, Chandler also agreed not to seek future employment of any nature with the DeKalb County School System.

(student religious literature distribution subject to same time, place, and manner restrictions as student distribution of nonreligious materials). Elsewhere, however, the injunction commanded DeKalb to impose discriminatory restrictions only on private religious expression. *Id.* D4-D11. For example, students could recite secular texts or sing secular songs at school-sponsored talent shows but could not use material with a religious content or viewpoint. Pet. App. D8-D9 (para. 6(d)). Student graduation speakers could expound at length on secular subjects or the gratitude due parents but could not give more than a "brief personal expression . . . which contains religious references," Pet. App. D5-D6 (para. 6(b)).

In view of its earlier opinion overturning the challenged state statute and its permanent injunction addressing the challenged religious practices, the district court then vacated a trial setting for the case as unnecessary.

On November 12, 1997, the district court issued findings of fact and conclusions of law in a Supplemental Opinion and Order. Pet. App. E1-E67. The same day, the district court granted partial summary judgment for Chandler and made accompanying findings of fact and conclusions of law in a Memorandum Opinion and Order. Pet. App. F1-F26.

Respondents[2] appealed from the Permanent Injunction, the Supplemental Opinion and Order, and the Memorandum Opinion and Order.

On appeal, respondents contested only certain aspects of the *remedy* the district court selected. Respondents did not appeal the district court's invalidation of the challenged state statute. Nor did respondents contest on appeal the district court's findings that the DeKalb County defendants had previously engaged in unconstitutional officially organized or sponsored religious activities. Rather, the respondents challenged on appeal only specific portions of the Permanent Injunction. *See* Pet. App. A4-A6.

In particular, respondents focused their appeal upon those portions of the Permanent Injunction that forbade DeKalb County from "permitting" various religious expressive activities by students and other nonschool personnel. Respondents did not contend that students have an affirmative right to engage in religious speech even where secular student speech would not be permitted. Instead, respondents argued that the injunction improperly required DeKalb to impose unconstitutionally *discriminatory* restrictions on private religious expression. Respondents also contended that the injunction's mix of broad restrictive language and ambiguously defined "safe harbor" exceptions (and exceptions to the exceptions) rendered the injunction impermissibly vague. Finally, respondents argued

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[2]In this Brief in Opposition, "respondents" refers to all of the respondents except the Governor of Alabama. Then-Governor Fob James filed a separate appeal, which the Eleventh Circuit rejected, Pet. App. A4. The current Governor, Don Siegelman, has not sought review of that decision.

that considerations of mootness and lack of standing doomed some (but not all) of plaintiffs' requests for prospective injunctive relief.

A panel of the U.S. Court of Appeals for the Eleventh Circuit unanimously vacated the Permanent Injunction. Pet. App. A1-A27. The panel held that "genuinely student-initiated religious speech . . . is fully protected by both the Free Exercise and the Free Speech Clauses of the Constitution." Pet. App. A16. The panel condemned the "discriminatory suppression of student-initiated religious speech," *id.* A15; *accord id.* A14, A25, while noting that a "school may impose the same reasonable restrictions on the time, place, and manner of religious speech as it does on secular student speech," *id.* A25. Because the Permanent Injunction forbade DeKalb from "permitting" students to "speak religiously," the panel concluded the injunction unconstitutionally required DeKalb to engage in discriminatory suppression of student religious speech. *Id.* A26-27. Accordingly, the panel vacated the Permanent Injunction and remanded for further proceedings. *Id.* A27. "We do not undertake to re-write the Permanent Injunction," the panel explained. "The district court is in the best position to do that." *Id.*

Given its disposition of the appeal, the panel had no occasion to address respondents' vagueness arguments or to examine, in the first instance, to what extent considerations of mootness and standing might limit the relief Chandler could obtain.

The Eleventh Circuit denied rehearing and rehearing en banc. *Id.* G1-G2. At Chandler's request, however, the Eleventh

Circuit stayed its mandate pending the filing and disposition of Chandler's petition for certiorari.

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS FOR WHICH PETITIONERS SEEK REVIEW ARE NOT PRESENTED IN THIS CASE.

As an initial matter, this Court should deny review because the "Questions Presented," for which petitioners seek review, are simply not presented by this case.

In Question One, petitioners attack the constitutionality of "group prayer before a captive audience of K-12 students," Pet. at i. This question is not presented. Neither the Permanent Injunction under review, nor the Eleventh Circuit opinion vacating that injunction, purport to address the distinct issues of either "group prayer" or "captive audiences." Rather, the Permanent Injunction restricted religious speech by *any* student, whether engaged in as an individual or together with others. The injunction was also not limited to "captive" situations. The Eleventh Circuit, overturning the district court, merely directed implementation of the neutrality principle for genuinely student-initiated speech. Petitioners' phrasing of Question One, then, is a tendentious characterization of a narrow hypothetical, and not a fair description of any question properly presented. Furthermore, Michael Chandler and his *eleventh-grade* son lack standing to seek prospective relief regarding *grades K-10*; in addition, therefore, petitioners cannot press Question One, as phrased, for jurisdictional reasons.

In Question Two, petitioners accuse the Eleventh Circuit of approving school officials' creation of a "special platform for prayer in the schools" for students and nonstudents. Pet. at i. The Eleventh Circuit did nothing of the kind. On the contrary, the panel expressly condemned as unconstitutional any "policy which 'permits' private parties to speak, but then limits their speech to prayer or other devotional speech." Pet. App. A9-A10. According to the court below, "the State's decision to create an exclusively religious medium . . . violates the Establishment Clause." *Id.* A10 (emphasis omitted).

In sum, neither of the two questions petitioners pose are properly presented here.

II. THE DISTRICT COURT SHOULD BE PERMITTED THE OPPORTUNITY TO REDRAFT THE INJUNCTION IN THE FIRST INSTANCE.

The decision of the Eleventh Circuit in this case is nonfinal. The court of appeals vacated the Permanent Injunction but did not "undertake to re-write" that injunction. Pet. App. A27. The court of appeals recognized that "[t]he district court is in the best position to do that [i.e., rewrite the injunction]." *Id.* Accordingly, the court of appeals remanded for further proceedings. *Id.*

This Court should deny certiorari to allow the district court the opportunity to redraft any injunction that might still be warranted. This approach makes eminent sense for several reasons.

First, the injunction has to be narrowed in significant respects in any event, which will eliminate much of the scope of the controversy. It would be premature and an exercise of advisory opinion-making for this Court to review constitutional issues that likely will be removed from the case on remand.

- Michael Chandler, the lead petitioner, has retired from his position as assistant principal at a DeKalb County high school. Hence, his only basis for seeking prospective relief is as a parent.[3] Michael Chandler's son Jesse, meanwhile, is now an eleventh grader. Any claims for prospective relief -- which is all petitioners seek -- based upon alleged unconstitutional practices in lower grades are now moot. *See, e.g., Joint School District No. 241 v. Harris*, 515 U.S. 1154 (1995) (vacating and remanding for dismissal, as moot, Establishment Clause challenge to graduation prayer, apparently because student plaintiffs graduated during pendency of case).[4]

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[3]Michael Chandler also alleged that he was a taxpayer, Cplt. at 3, but he did not allege or prove that the practices challenged as unconstitutional necessitated any expenditures of tax funds. Consequently, Chandler lacks taxpayer standing. *See Crampton v. Zabriskie*, 101 U.S. 601, 609 (1880) (taxpayer standing requires challenge to a genuine "disposition of the [government] moneys"); *Flast v. Cohen*, 392 U.S. 83, 102 (1968) (for taxpayer standing, it "will not be sufficient to allege an incidental expenditure of tax funds in the administration of [government]"); *Doremus v. Board of Educ.*, 342 U.S. 429, 431-35 (1952) (incidental expenditures insufficient for taxpayer standing).

[4]For example, there is no suggestion that Jesse will ever again encounter Ms. Carroll, his fifth and sixth grade teacher who allegedly solicited student prayer. Cplt. ¶ 16; M. Chandler Aff. ¶ 17. Likewise, Jesse will never more encounter the Gideon's distribution of Bibles to the fifth grade classes. Cplt. ¶ 42; M. Chandler Aff. ¶¶ 21-25. The Gideons have only distributed

(continued...)

- The Permanent Injunction improperly granted relief at *all* DeKalb schools, regardless of where Jesse was in attendance. The excessive scope of this relief must be addressed on remand. Lack of Article III standing bars Jesse from seeking relief for activities that he has neither witnessed nor is likely to witness. Thus, Jesse cannot pursue relief at schools he does not attend. Relief for Jesse for schoolday activities must be limited to Fyffe School;

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[4](...continued)
to the fifth and twelfth grade classes. Cplt. ¶ 44; M. Chandler Aff. ¶ 24. Only the twelfth grade lies ahead for Jesse, and a new DeKalb policy precludes Gideon distribution of Bibles in twelfth grade (and other grade) classrooms. *See* "Distribution of Literature -- Student Rights and Protection" (R. Supp. 1-240, Ex. A) (forbidding "the distribution by . . . nonschool individuals of commercial, political, religious, or promotional materials to students on public school property"); Order (R. Supp. 1-260-1 to 2) (approving policy). Monthly 4-H meetings are held for elementary and junior high school students. Cplt. ¶ 30; M. Chandler Aff. ¶ 26. Concerns regarding these meetings, Cplt. ¶ 29; M. Chandler Aff. ¶ 27-28, became moot when Jesse finished ninth grade in the spring of 1998. Jesse's objection to the D.A.R.E. program for fifth graders, Cplt. ¶¶ 25-27; M. Chandler Aff. ¶¶ 29-32, likewise presents no injury likely to recur. There is no indication that the December 1994 PTO incident -- the coincidence of Jesse's school concert band playing at a meeting which was opened by a prayer, Cplt. ¶ 28; M. Chandler Aff. ¶¶ 34-36 -- is ever likely to recur. The same goes for the two incidents in 1995 in which Jesse received flyers about religious programs or events. Cplt. ¶¶ 45-46; M. Chandler Aff. ¶¶ 37-39.

In sum, the only matters, concerning Jesse, for which there would be any likelihood of recurrence, appear to be prayers at football games he attends, Cplt. ¶ 19; M. Chandler Aff. ¶ 15, graduation prayers at Fyffe School (the school Jesse was attending, Cplt. ¶ 2), Cplt. ¶ 22; M. Chandler Aff. ¶ 4, and special meeting times or assemblies of Bible clubs at Fyffe School, Cplt. ¶ 49; M. Chandler Aff. ¶¶ 42-44. As to all other matters, mootness precludes relief. Moreover, there is no apparent reason why Jesse would have standing to challenge the Bible club meeting times.

relief as to meetings or football games must be limited to those events that involve the Fyffe School Concert Band (of which Jesse was a member) or a Fyffe football team (whose games Jesse attended), or other events at which Jesse is likely to be in attendance. Jesse cannot claim concrete injury from activities at which he was not and will not likely be present. "[P]sychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1019 (1998).

- The Permanent Injunction is vague in many respects and requires redrafting for clarity. Many examples could be cited. *E.g.*, Pet. App. D5 (allowing students to engage in religious activity only if they do so "quietly" and if the activity "does not unduly call attention thereto"); *id.* D6 (allowing student speakers to include in a graduation address only a "brief personal expression . . . which contains religious references"). (The district court expended considerable ink attempting to explain that its injunction did not mean what its terms apparently stated, Pet. App. B28-B91, and begrudgingly conceded that, at least in part, the injunction "may not be sufficiently narrowly tailored," *id.* B42 n.24.)

Second, the district court is best situated to make the initial determination of how to redraft the injunction. Standing, mootness, and vagueness considerations all have factual dimensions as well as legal dimensions. The district court -- unlike a reviewing court -- can take additional evidence on these issues. The district court can then decide what, if any, prospective relief would represent a properly tailored response

to the specific factual circumstances and remaining legal controversies. At that point, any party considering itself aggrieved could seek further review.

Third, Supreme Court review at the present stage would require this Court to address issues not yet addressed or decided below. The Eleventh Circuit did not reach any of the standing, mootness, or vagueness arguments -- by vacating the injunction in its entirety and remanding, the court of appeals did not need to reach these issues. But to uphold the Permanent Injunction -- the relief petitioners seek -- this Court would have to confront and resolve these additional objections to the Permanent Injunction. In particular, this Court would first need to address the threshold jurisdictional questions of standing and mootness. Given that resolution of these matters should sharply limit the scope of the legal controversy, it makes little sense to grant review at the present stage of proceedings.

Fourth, the district court will be free to apply on remand any pertinent guidance from intervening decisions of higher courts. As noted above, *supra* note 4, the remaining controversy within federal subject matter jurisdiction appears to consist largely, perhaps entirely, of the constitutionality of student-initiated religious expression at football games and the constitutionality of student-initiated religious expression at graduation ceremonies. This Court is currently addressing the former issue in *Santa Fe Independent School District v. Doe*, No. 99-62, and the Eleventh Circuit (the circuit from which this case arises) is currently addressing the latter issue *en banc* in *Adler v. Duval County School Board*, 174 F.3d 1236, 1271 (11th Cir. 1999). The district court will shortly have the benefit of both these rulings, which the district court obviously can and should

consider when redrafting the injunction on remand. No grant of review is necessary to preserve the district court's ability to take these forthcoming rulings fully into account.

In sum, the injunction at issue has been remanded for redrafting. On remand, the district court will need to address the impact of mootness, standing, and vagueness concerns as well as the Eleventh Circuit's opinion below and the forthcoming opinions in *Santa Fe* and *Adler*. Supreme Court review at this point would be premature.

III. THE DECISION OF THE ELEVENTH CIRCUIT FAITHFULLY APPLIES THIS COURT'S PRECEDENTS.

The opinion of the Eleventh Circuit in this case faithfully applies this Court's precedents under the First Amendment's speech and religion clauses. Petitioners' attempt to characterize the decision below in a contrary fashion represents a serious distortion and misreading of that decision.

The precise question before the Eleventh Circuit was whether the district court erred by ordering the DeKalb County schools to impose discriminatory restrictions on private religious speech (primarily student speech). Pet. App. A13-A14. The Eleventh Circuit properly rejected the district court's approach and held that school officials must treat genuinely student-initiated religious speech evenhandedly with student-initiated non-religious speech. *Id.* A14-A27. This is no more than a straightforward application of this Court's many precedents upholding equal access for, and government neutrality toward, private religious expression. *E.g.*, *Everson*

v. Board of Educ., 330 U.S. 1, 18 (1947); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993).

The Eleventh Circuit did *not* hold that school facilities are public fora, contrary to petitioners' assertion, Pet. at 19, 23, 25. Rather, the Eleventh Circuit noted that *even in nonpublic fora*, it is unconstitutional to impose viewpoint-discriminatory restrictions on private speakers. Pet. App. A25.

The Eleventh Circuit did *not* hold that schools must allow religious speech by students or nonstudents, contrary to petitioners' assertion, Pet. at 11, 15, 21 n.19, 25. Rather, the Eleventh Circuit merely held that, if and when school officials permit genuinely student-initiated nonreligious speech, those officials must treat private religious speech evenhandedly. As the court of appeals explained:

> A student's right to speak religiously is not . . . without limit. The school may impose the same reasonable restrictions on the time, place, and manner of religious speech as it does on secular student speech.

Pet. App. A25.

The Eleventh Circuit did *not* proscribe "only prayer led by school officials," contrary to petitioners' assertion, Pet. at 18. Nor did the Eleventh Circuit limit the category of "state action" to speech "initiated by school officials," contrary to petitioners' assertion, Pet. at 25. Rather, the Eleventh Circuit held that the Establishment Clause proscribes a range of activities that it deemed to fall within the scope of "state action," including

- state creation of an exclusively religious forum for private speakers, Pet. App. A10; and,

- active endorsement, encouragement, or participation by the state regarding student religious speech, Pet. App. A24 & n.19.

In sum, petitioners misleadingly attempt to depict the decision below as extreme and outrageous, as if the ruling somehow allowed would-be religious speakers the right to burst into classrooms and lead prayer while the teacher cowered in the corner. Quite to the contrary, the decision below gives genuinely private religious speech no greater privilege than genuinely private nonreligious speech.

IV. THERE IS NO CONFLICT IN THE CIRCUITS WARRANTING REVIEW.

Petitioners assert a "direct conflict" between the decision below and the decisions of other circuits. This is not accurate. The only decision that conflicts with the decision below is the Fifth Circuit's decision in *Doe v. Santa Fe Independent School District*, 168 F.3d 806 (5th Cir.), *cert. granted*, 120 S. Ct. 494 (1999). The conflict between *Doe v. Santa Fe* and the decision below is limited to the issue of student-initiated prayer at football games, and this Court has already granted certiorari on that precise question in the Fifth Circuit case, *see Santa Fe Independent School District v. Doe*, No. 99-62.

A. The Conflict with *Doe v. Santa Fe* Does Not Warrant Review.

The solitary conflict with the Fifth Circuit's decision in *Doe v. Santa Fe* does not warrant Supreme Court review. This Court has already granted certiorari in *Santa Fe*, and the Eleventh Circuit has remanded the present case for further proceedings. This combination of factors negates any reason for certiorari. If this Court reverses in *Santa Fe*, then the conflict between *Santa Fe* and the decision below vanishes. On the other hand, if this Court affirms, modifies, or takes some other action in *Santa Fe*, the district court in the present case is perfectly capable of incorporating this Court's decision into its analysis on remand.

B. The Decision Below Does Not Conflict with Any Other Circuits.

Petitioners assert a conflict between the Eleventh Circuit's decision in this case and various decisions of other circuits. These supposed conflicts are specious, as the Eleventh Circuit itself already explained. *See* Pet. App. A9-A10, A23 & n.18. None of these other cases contradict the principle set forth by the Eleventh Circuit: that schools may not constitutionally impose *discriminatory* restrictions on *genuinely student-initiated* religious speech.

Thus, in *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982), the challenged statute authorized prayer, and only prayer, 653 F.2d at 899. The statute challenged in *Ingebretsen v. Jackson Public School District*, 88 F.3d 274, 277 (5th Cir.), *cert. denied*, 519 U.S. 965 (1996),

only authorized invocations, benedictions, and prayers. The practice challenged in *Collins v. Chandler Unified School District*, 644 F.2d 759, 760-61 (9th Cir. 1981), was to the same effect.

None of these cases advance Chandler's arguments; in all of these cases, the school system "allowed" religious speech, but only after the school system itself mandated that the speech would be religious. These cases are therefore analogous to the hypothetical case of a school that allows *only religious clubs* to meet in classrooms after hours. The flaw in such a scheme is not the *allowance* of private religious speech, *see Board of Educ. v. Mergens*, 496 U.S. 226 (1990), but the *favoring*, by the government, of private religious speech, *see* Pet. App. A9-A10.[5]

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[5]In *ACLU v. Blackhorse Pike Regional Board of Education*, 84 F.3d 1471 (3d Cir. 1996) (en banc), the school policy gave the student body the option of voting explicitly for prayer, *id.* at 1475. The Third Circuit faulted this policy for enabling a plurality of the student body to compel prayer at graduation. *Id.* at 1477. (This contrasts sharply with a policy, like the "football policy" at issue in *Santa Fe*, which leaves the student speaker total and final discretion whether to deliver a secular or religious message. Such a policy accommodates student freedom of expression and does not permit a majority to command implementation of its religious desires.) The present case concerns no such "vote-for-prayer" policy.

In *Berger v. Renssalaer Central School Corporation*, 982 F.2d 160 (7th Cir.), *cert. denied*, 508 U.S. 911 (1993), school policy gave the principal and superintendent total discretion to grant or deny permission to outside speakers to distribute literature or publications to students, 982 F.2d at 1162-63. Such discretion is no guarantee of neutrality, and in fact can mask its opposite. The injunction in this case, by contrast, *required* school officials to discriminate against religious expression.

In *Stein v. Oshinsky*, 348 F.2d 999 (2d Cir.), *cert. denied*, 382 U.S. 957 (1965), the Second Circuit assumed that *permitting* prayers would *not* (continued...)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

William H. Pryor Jr.
Attorney General of
Alabama
Thomas F. Parker IV
Assistant Attorney
General
Office of the Attorney
General of Alabama
11 South Union St.
Montgomery, AL 36130
(334) 242-7372

Jay Alan Sekulow
Deputy Attorney General
Walter M. Weber
Suite 609
1000 Thomas Jefferson St., NW
Washington, DC 20007
(202) 337-2273

Stuart J. Roth
Center for Faith & Freedom
Building
120 Ziegler Circle E
Mobile, AL 36608
(334) 633-2154

January 26, 2000

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[5](...continued)
violate the Establishment Clause, and simply held that the Free Speech and Free Exercise Clauses conferred no *special right* to interrupt the school day with prayer, 348 F.2d at 1001-02.

Finally, in *Doe v. Duncanville Independent School District*, 70 F.3d 402 (5th Cir. 1995), the Fifth Circuit *allowed* students to pray, individually or in groups, so long as school officials did not participate.

Supreme Court, U.S.
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(4)

No. 99-935

In The

Supreme Court of the United States

MICHAEL CHANDLER, individually and as father and next friend of JESSE CHANDLER,

Petitioners,

vs.

FORREST H. "FOB" JAMES, JR., in his official capacity as Governor of the State of Alabama and as President of the State Board of Education, *et al.*,

Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

PAMELA L. SUMNERS*
LAW OFFICES OF PAMELA L. SUMNERS
P.O. Box 370862
Birmingham, AL 35237-0862
(205)320-0200
*COUNSEL OF RECORD

ELIZABETH J. HUBERTZ
P.O. Box 370862
Birmingham, AL 35237
(205)567-9326

additional counsel on inside cover

14/pp

STEVEN K. GREEN
AMERICANS UNITED FOR SEPARATION OF CHURCH & STATE
518 C Street, N.E.
Washington, D.C. 20002
(202) 466-3234

STEPHEN L. PEVAR
ACLU FOUNDATION
1888 Sherman Avenue
Suite 380
Denver, CO 80203
(303) 839-5752

Counsel for Petitioners

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ARGUMENT

Respondents fail to respond to the central issues on which Petitioners seek certiorari: whether "permitting" students and nonschool personnel to lead students in prayer and other religious activities in classrooms, at school assemblies, and at other school-sponsored events involving captive audiences constitutes endorsement and coercion of religious activity in violation of the Establishment Clause, and whether refusing to permit such activities in school-sponsored settings results in "viewpoint discrimination." Rather, Respondents obfuscate the distinction between school-sponsored and private prayer and theorize that permitting prayer via the machinery of the state is mere neutrality toward religious speech. These errors mirror those of the Eleventh Circuit's decision.

I. THIS CASE SQUARELY PRESENTS THE QUESTION OF WHETHER "PERMITTING" STUDENTS AND NONSCHOOL PERSONNEL TO ENGAGE IN GROUP PRAYER BEFORE A CAPTIVE STUDENT AUDIENCE VIOLATES THE ESTABLISHMENT CLAUSE

Respondents claim that this case is not about "group prayer before a captive audience of K-12 students," but is instead about private prayer and neutrality toward private prayer. (*See* Resp. Br. at 6-7.) As Respondents are aware, however, Petitioners have never challenged purely private religious activity, such as students saying grace at lunch (*see, e.g.*, App. E25 (testimony to this effect)), and the injunction

forbids only "school-sponsored" or "officially sanctioned" – not private -- prayer. (*See* App. D4-5, D9.)

The Eleventh Circuit misdefined "private" prayer, emphasizing the identity of the speaker rather than the context in which the speech occurs. The court held that school officials must permit "students, or other private parties"[1] to engage in religious speech before an audience of students, over the intercom, to the same extent -- and with only the same time, place, and manner restrictions -- as they are permitted to engage in secular speech. (*See* App. A22.) This holding undeniably extends to corporate prayer before captive audiences. The Eleventh Circuit itself recognized this, in suggesting that dissenting captive schoolchildren can simply "not listen" and "not participate," while enduring "social isolation or even anger" – since that is "the price the Constitution extracts for our own liberty." (App. A20-21.) The decision applies "in school" and "at school-related events," without limitation. (App. A22. S*ee also* App. A6, A8, A11, A13, A21.)

The Eleventh Circuit justifies this sweeping holding on

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[1] Respondents dispute that public forum analysis is implicated in the Eleventh Circuit's decision. (Res. Br. at 13.) They are at a loss, therefore, to explain how persons other than students have the rights in the school setting that the Eleventh Circuit conferred. They insist instead that the decision does not plainly draw a distinction between school employees on one hand, and students and nonschool personnel, on the other. (*Compare* A6 n. 6 *with* A5, A22 *and* Res. Br. at 13.)

the theory of "neutrality." However, an understanding of neutrality that commands schools to permit students and *nonschool personnel* to engage in religious speech, not only "in school" but in school-sponsored events as well, is anomalous. (*See* Pet. Br. at 10-22.) Contrary to Respondents' argument, not one of this Court's precedents sanctions explicitly religious speech at school-sponsored events before captive schoolchildren under the banner of "neutrality."

Rather, this Court has assayed that viewpoint neutrality "permits" explicitly religious speech *only* in those situations involving fora that have been made available to a wide array of viewpoints, and *only* in a context of noncaptive audiences. *See Rosenberger v. Board of Rectors,* 515 U.S. 819, 831, 842 (1995) (university that funds "wide spectrum" of over 100 student newspapers covering student news, information and opinion must fund Christian newspaper that covers same subject matter); *Lamb's Chapel v. Center Moriches Union Sch. Dist.*, 508 U.S. 384, 395 (1993) (school that has made buildings available after hours to "a wide variety of private organizations" must make facilities available to religious organizations to speak on these same subjects); *Widmar v. Vincent*, 454 U.S. 263, 276-77 (1981) (university that has made facilities available to "broad class" of over 100 recognized student groups must allow access to religious groups as well).

The Eleventh Circuit's extension of this "neutrality" standard to classrooms, assemblies, and other school-sponsored events where captive audiences are present is inconsistent with

this Court's precedents and should be corrected.

II. RESPONDENTS' ARGUMENTS FOR DENYING THE WRIT ARE RED HERRINGS.

Unable to meet the Petitioners' substantive arguments, Respondents offer arguments about jurisdictional and prudential matters that are belied by the facts and rebuffed by the law.

First, Respondents labor to create the misimpression that the Court would wade into a factual morass if it grants the petition. (*See* Resp. Br. at 4-10.) This is untrue. Respondents did not contest any of the facts on appeal; they are established. (*See* DeKalb's Brief on Appeal at 4 (waiving the facts).) The sole, ripe question is whether the Eleventh Circuit applied the correct *law* governing religious speech by students and nonschool persons in school-sponsored settings with captive student audiences.

Second, Respondents argue that the Chandlers lack standing. (*See* Resp. Br. at 8 and 8 n.4.) These arguments were briefed and rejected without comment by the Eleventh Circuit.[2]

Respondents make the novel argument that since Jesse Chandler is now an eleventh grader, he cannot challenge establishments of religion in grades K-10. This reasoning is undone by the fact that DeKalb County's eight schools enroll

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[2] The parties' positions have not changed since the opinion issued.

grades K-12 on one campus. The school-sponsored events at issue are not necessarily limited to one grade or, in some cases, to one school. Events such as graduations, the trial court found, are communitywide events attended by students of all ages from various schools. (App. E40.) Establishment Clause violations are not confined by grade levels, contrary to Respondents' conjecture.[3]

Respondents also suggest, creatively, that *evidence* of particular constitutional violations can be extracted from categories of enjoined conduct as though each piece of evidence stands alone. They Balkanize standing: Jesse is no longer in fifth grade and will not therefore attend a 4-H Club assembly with broadcast prayer, Jesse no longer is in Ms. Carroll's homeroom and therefore will not be subjected to her prayers. This is not the point.

The trial court found "pervasive and recurrent" school-sponsored religious activities. (App. E11.) Jesse may never again attend a fifth-grade D.A.R.E. or 4-H assembly where there is prayer over the state's microphone. But he will, and while this suit was pending did, attend assemblies and school-related events featuring prayer. (App. E19-20.) Jesse may

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[3] Respondents also contend that Jesse may obtain a remedy only against his school, Fyffe. The authorities say otherwise. *See Lewis v. Casey*, 518 U.S. 343, 359-60 (1996); *Wallace v. Jaffree*, 459 U.S. 1314 (1983); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 465-66 (1979). Respondents' theory, while novel, is unpersuasive.

never encounter Ms. Carroll again, but he will encounter classrooms until he graduates, and there is evidence of recurrent classroom prayer, including at Fyffe, by a teacher other than Ms. Carroll. (*See* R13-316; App. E22-23.) He will attend graduations, both his own and others', and he will attend football games, as he did pre-suit.

Jesse has personally experienced every category of "pervasive and recurrent" conduct the injunction proscribes. (App. E11-62.).[4] This is all he must show for standing.[5]

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[4] Respondents assert that, although Gideon distributions occur in twelfth-grade classrooms, Jesse will not encounter them again because the school board has adopted a "no-distribution" policy for materials that are not distributed by students. (Resp. Br. at 8 n.4.) They overlook that the policy was adopted under court order. (*See* D10 (ordering policy).) Nor does DeKalb have an even record of applying the policy. In 1999, DeKalb allowed Sav-a-Life to distribute materials and allowed distribution of a "Football for Christ" solicitation, in violation of the policy. (R13-316; R13-317.)

[5] Respondents' contentions with regard to Michael Chandler are meritless. He has not retired as Jesse Chandler's father, and he alleged injury to his parental rights. *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Since Jesse experienced the pervasive conduct that was enjoined, however, Respondents' remarks on Mr. Chandler's standing or mootness are irrelevant. *See also Lee v. Weisman*, 505 U.S. 577 (1992) (where child and parent have alleged injury to protected rights, addressing taxpayer standing is irrelevant).

III. THE ELEVENTH CIRCUIT IS AT ODDS WITH ITS SISTER CIRCUITS

As Petitioners observed, the Fifth, Third, Ninth, Second, and Seventh Circuits have parted ways with the Eleventh. (Pet. Br. at 24-30.)

Respondents imply that the cases cited by Petitioners were decided as they were because prayer, and no other speech, was involved in the captive-audience settings featured in these cases. On the facts of our case, this is a distinction without a difference, for there was no secular counterpart to prayer. (*See* Pet. Br. at 2-6.)

For example, Respondents distinguish *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274 (5th Cir.), *cert. denied sub nom., Moore v. Ingebretsen*, 519 U.S. 965 (1996) on the ground that Mississippi's statute permitted *only* prayer. So did Alabama's, and *Chandler* in fact involved *applications* of a statute mandating that the schools "shall permit" prayer at school-sponsored events. They distinguish *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759 (9th Cir. 1981) on the ground that the policy permitted only prayers. So did DeKalb's policy and statutory applications, as is clear from the undisputed facts. (*See* Pet. Br. at 2-9.) They distinguish *Berger v. Renssalaer Cent. Sch. Corp.*, 982 F.2d 1160 (7th Cir.), *cert. denied*, 508 U.S. 911 (1993) on the ground that the schools vested total discretion in principals to allow Gideon Bible distributions. So did Respondents, which is why the trial court ordered DeKalb to adopt a uniform policy. (App. E54.) They distinguish *ACLU*

v. Black Horse Pike Reg. Bd. of Educ., 84 F.3d 1471 (3d Cir. 1996) (*en banc*) on the ground that students could vote *only* on whether they wanted explicitly prayer at graduation. This is unavailing; DeKalb's policy was to unilaterally insert prayers. Respondents' distinction of these cases is thus unpersuasive even with their interpretive gloss.

Furthermore, it is pretense to suggest that these cases were decided on the basis that prayer was the only speech permitted at school-sponsored events. This is not the principle for which the cases of these other circuits stand. Respondents cannot distinguish these cases, all contrary to *Chandler*, for the simple reason that each rejects Respondents' intimation that if schools endorse other speech, they are freed from the constraints of the Establishment Clause to endorse prayer. In truth, the cases from other circuits that Respondents purport to distinguish explicitly reject Respondents' and the Eleventh Circuit's position. In stark contrast to the Eleventh Circuit, other circuits have held that "permitting" the school's events and facilities to be used for prayer and devotional activity works an endorsement of religion. (*See* Pet. Br. at 26-28.) This is the exact opposite of the Eleventh Circuit's holding.

IV. THE PENDENCY OF *SANTA FE v. DOE* DOES NOT COUNSEL DENYING THE WRIT

Respondents urge that the pendency of *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806 (5th Cir. 1999), *cert. granted*, 68 U.S.L.W. 3321 (U.S. Nov. 15, 1999) (No. 99-62) counsels

denying the writ.[6] It does not. In *Santa Fe*, the school board policy allows students (and only students) designated time to speak on their chosen topic. The Eleventh Circuit decision, by contrast, allows *nonschool personnel* to pray in school and at school-sponsored events. This exceeds entirely the "student-initiated prayer" issue that Respondents, ignoring the presence of clergy and evangelists in this case, contend is at issue here. (*Compare* Resp. Br. at 14 *with* App. E.)

Respondents' suggestion that this case bounce up and down among the lower courts because *Santa Fe* is being heard is illogical. (Resp. Br. at 11-12.) This case presents issues not present in *Santa Fe* that merit review here. If the Court feels otherwise, however, Petitioners urge the Court, in accordance with its practice, to provisionally grant the writ and hold this case pending its decision in *Santa Fe*. This would obviate the risk of multiple and inconsistent decisions in lower courts, on at least the common issue of nonschool-day pregame prayer that will be resolved in *Santa Fe*.

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[6] They also insist that the writ should be denied because the Eleventh Circuit is hearing *Adler v. Duval County* en banc. *See Adler v. Duval County Sch. Bd.*, 174 F.3d 1236 (11th Cir. 1999). *Adler* has no effect here; indeed, *Adler* will be wholly governed by the decision in *Santa Fe*, since both involve only noninstructional settings – not classrooms and schoolday activities. Moreover, *Adler*, like *Santa Fe*, cannot resolve the issue of the rights of nonschool personnel to pray in schools, since the policy in that case is limited to students.

CONCLUSION

This Court should grant the writ. Alternatively, at a minimum, it should provisionally grant the writ and hold the case pending disposition of *Santa Fe.*

Respectfully submitted,

PAMELA L. SUMNERS*
LAW OFFICES OF PAMELA L. SUMNERS
P.O. Box 370862
Birmingham, AL 35237-0862
(205)320-0200
*COUNSEL OF RECORD

ELIZABETH J. HUBERTZ
P.O. Box 370862
Birmingham, AL 35237
(205)567-9326

STEVEN K. GREEN
AMERICANS UNITED FOR SEPARATION OF CHURCH & STATE
518 C Street, N.E.
Washington, D.C. 20002
(202) 466-3234

STEPHEN L. PEVAR
ACLU FOUNDATION
1888 Sherman Avenue
Suite 380
Denver, CO 80203
(303) 839-5752